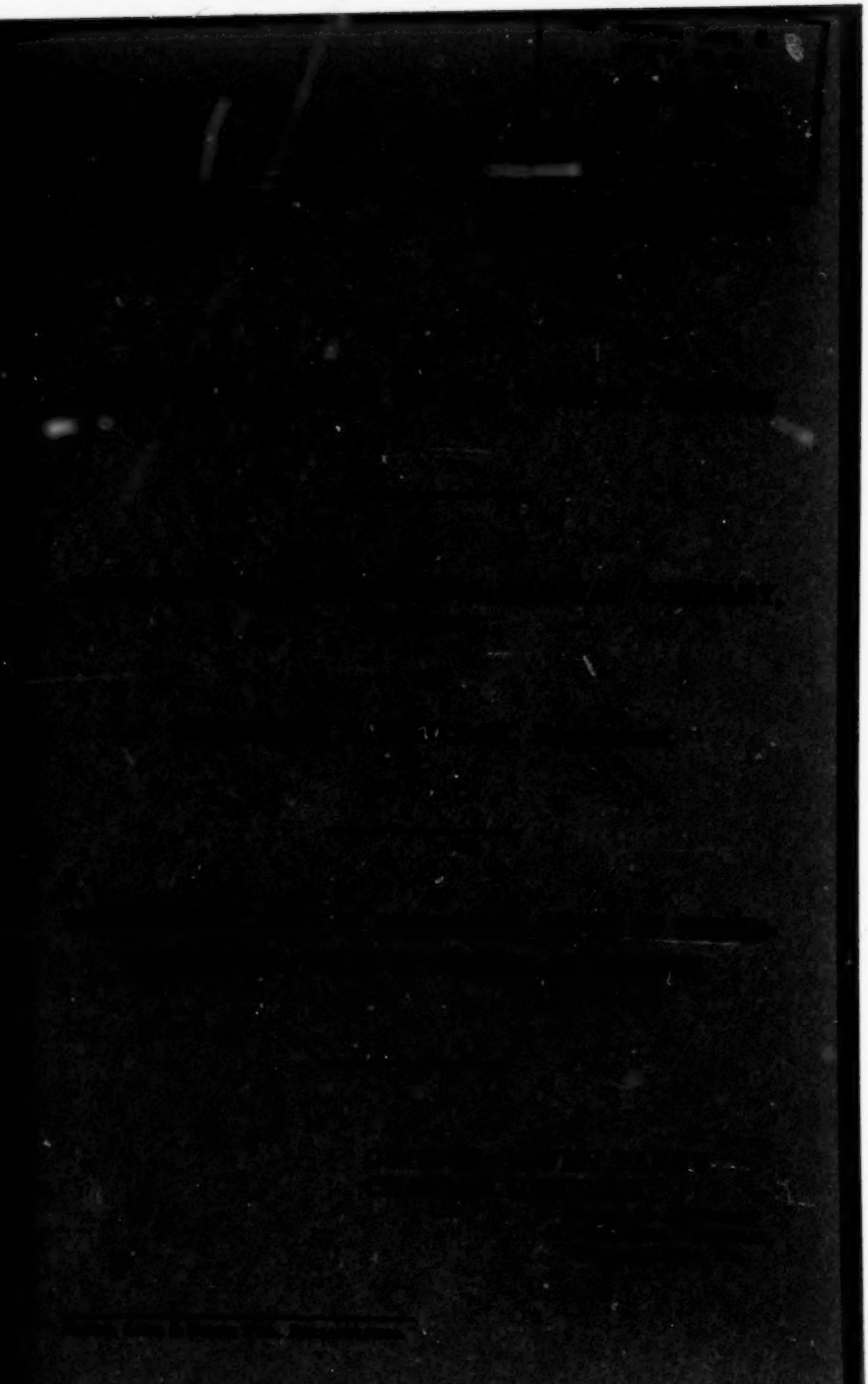

In the Supreme Court of the United States.

OCTOBER TERM, 1919. No. .

Philadelphia and Reading Railway Company, Petitioner,

vs.

Margaret L. Hancock, Respondent.

DEAR SIR:—Please take notice that upon the annexed petition of Philadelphia and Reading Railway Company, a certified copy of the entire transcript of the record of this cause, including the proceedings in the Supreme Court of Pennsylvania, submitted herewith, and the petitioner's brief, also to be submitted upon the presentation of the petition, an application will be made to the Supreme Court of the United States, at a term of said Court, appointed to be held at the Capitol, Washington, D. C., on Monday, the sixth day of October, 1919, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, for a writ of certiorari to be directed to the Supreme Court of the State of Pennsylvania, to review the decree or judgment of said Court, rendered in the above cause on the fourteenth day of April, 1919, which affirmed the decree or judgment of the Court of Common Pleas of Schuylkill County, Pennsylvania, entered in said Court on the twenty-

second day of April, 1918, upon an award of the Workmen's Compensation Board of Pennsylvania, in favor of Margaret L. Hancock, the respondent, for the sum of $6272.39.

Dated at Philadelphia, July 8th, 1919.

GEORGE GOWEN PARRY,
Of Counsel for Petitioner,
415 Reading Terminal, Philadelphia, Pa.

To L. L. Frank, Esq.,
Counsel for Respondent,
Mortimer Building, Pottsville, Pa.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1919. No. .

Philadelphia and Reading Railway Company, Petitioner,

vs.

Margaret L. Hancock, Respondent.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The Philadelphia and Reading Railway Company, in support of this, its petition for a writ of certiorari to be directed to the Supreme Court of the State of Pennsylvania to review a decree or judgment rendered on the fourteenth day of April, A. D. 1919, which affirmed the judgment of the Court of Common Pleas of Schuylkill County, Pa., entered on the twenty-second day of April, 1918, upon an award of the Workmen's Compensation Board of Pennsylvania in favor of Margaret L. Hancock for the sum of $6272.39, respectfully shows:—

1. That this action was begun by petition under the Workmen's Compensation Act of the State of Pennsylvania, filed by Margaret L. Hancock, dependent widow of John R. Hancock, claiming an award of compensation for the death of her husband, which occurred while in the course of his employment as a brakeman for the Philadelphia and Reading Railway Company.

2. That the defendant, your petitioner, duly filed its answer to the said petition, admitting that the accident occurred while the decedent was in the course of his employment, but denying liability therefor as follows:—

> "The defendant denies that it is liable to pay compensation under the facts alleged in the claim petition

for the following reasons: Because the decedent and defendant at the time the former was injured were engaged in interstate commerce."

3. That the record, a certified copy of which has been sent up on the writ of error allowed in this case, shows that the testimony is undisputed, and that there is no conflict of evidence; the claimant relying solely upon the fact that the cars were not weighed and way-billed until the day after Hancock was killed.

4. That the testimony shows that John R. Hancock, a brakeman employed by the Philadelphia and Reading Railway Company, was killed on March 15th, 1916, while employed in moving a coal train from Locust Gap Colliery to Locust Summit Yard, both in Pennsylvania, on the line of the Philadelphia and Reading Railway Company; that, before the train started, the shipper's clerk, in accordance with the established practice, gave the railway train conductor shipping directions, in the form of tickets covering each car in the train; that, upon each ticket were entered the initials and number of the car, its contents, capacity, the railway track scale where it was to be weighed, the order number and the code letters of the shipment; that, seven of the cars in the train were covered by tickets bearing the code letters "M. C.," which indicated that the car so marked was to go to a point on the New York Central Railroad, outside the State of Pennsylvania.

When the "M. C." cars and tickets reached the Shamokin Scale the following day, the name of the consignee and his address were entered on the tickets, which were returned to the colliery, and the cars were weighed, way-billed and forwarded to individual consignees, the destination in each instance conforming to the direction given by the code letters on the car tickets.

This method of handling coal shipments has been followed for many years. The cars from the collieries in the vicinity are first taken to Locust Summit Yard, thence those

destined west to go to Shamokin Scale and those for the east to St. Clair Scale. The correct freight rate cannot be applied until the cars are weighed, and therefore the billing clerks are stationed at the weigh scales. The rate or freight charge covers the whole journey from the colliery to the final destination.

The shipments are collected and concentrated in this way for convenience in railway operation, and to avoid the expense of maintaining track scales at each colliery.

5. The Compensation Referee awarded compensation, the defendant appealed alleging error of law, and the claimant petitioned for a hearing *de novo*. The Compensation Board granted the petition, heard the case *de novo*, and made an award to the claimant on the ground that the interstate journey of the cars did not begin until they left Shamokin, as way-bills consigning the cars to individual consignees were not issued till the cars reached that point. The Compensation Board thereupon made findings of fact that at the time Hancock was killed there were no cars in his train consigned to any points outside the State of Pennsylvania, although certain of the cars were marked "M. C.," and that the shipment of the cars was not undertaken, and did not begin till the day after he was killed.

6. The Court of Common Pleas upon appeal held these findings binding upon it without regard either to the other findings made by the Compensation Board or the reasoning in its opinion, both of which clearly showed that the Board had erred in the law upon the undisputed facts, and gave judgment dismissing the appeal. This judgment was affirmed by the Supreme Court of Pennsylvania on the ground that the finding of the Compensation Board, "That the cars were being transported from the mines to yards within the State, for the convenience of the shipper, and the subsequent shipments of any of them to points without the State were made after his death and after his train crew had severed its connection with the cars," was conclusive on the Court below. A petition for reargument was denied.

7. That in addition to the question whether there was any evidence to sustain certain findings of the Compensation Board, to the effect that the code letters "M. C." had no bearing on the destination of the cars, that the shipments were not made until after the accident, and that the movement from the colliery (where the cars were delivered by the shipper to the Railroad Company) to the scale was undertaken merely for the shipper's convenience, the question is raised that the findings of fact and conclusions of law as to the Federal right are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.

8. That the Workmen's Compensation Board found (page 14, Appellant's Paper Book attached hereto), "Interstate Commerce is not a matter of intention, but of fact; and, having found that the interstate shipments began at Shamokin Scales on the day after the deceased was killed, neither the deceased nor the defendant were engaged in inerstate commerce at the time of the accident." This is really a conclusion of law, for while the fact is undisputed that the cars were not weighed, rated and designated for individual consignees until they reached Shamokin, it is equally undisputed and found as a fact that they were not only destined by the shipper for the State of New York, and so marked at the time they were delivered to the Railroad Company at the colliery for transportation, but that the cars so marked actually made the interstate journey so indicated.

9. That when the finding of the Compensation Board was in part as follows:—

> "4. The work of the deceased for the defendant never took him outside of the State of Pennsylvania, and upon the date of his death there were no cars in the train upon which he was working which were consigned to any points outside of the limits of the State

of Pennsylvania, although on certain cars the cards were marked 'MC' as hereinbefore described.

"5. The cars of coal in the train upon which the deceased was working were being transported from the mines to different yards for the convenience of the shipper. The subsequent shipments of any of the cars in the train upon which the deceased was working to points without the State were made after the death of the deceased and after the train crew with which the deceased worked had severed its connection with the said cars.

"7. The code letters such as 'MC' and 'HA' as described in the testimony were used by the employees of the Philadelphia and Reading Coal and Iron Company for their own convenience and for the purpose of expeditiously assembling certain cars at certain points without any necessary bearing upon the ultimate destination of the said cars, although clearly it was the intention of the shipper that such cars were to eventually reach points outside of the State.

It was error for the Supreme Court of Pennsylvania to base its affirmance of the judgment upon finding 5 on the ground that it was conclusive on the Court below, and utterly ignore the equally conclusive character of finding 7 and finding 4 with its qualifying clause, that "certain cars were marked "M. C." as hereinbefore described.

10. That the question of law involved in this case is substantially as follows:—

"Is a brakeman engaged in interstate commerce, while working on a train of cars which were destined, marked and en route from a point in Pennsylvania to points in New York although way-bills consigning the cars to individual consignees had not yet been issued and were not to be issued until after the cars passed the railway scales?"

This question was duly raised and argued by your petitioner before the Compensation Referee, the Workmen's Compensation Board, in the Court of Common Pleas of Schuylkill County, and in the Supreme Court of Pennsylvania.

11. That the decision of the Workmen's Compensation Board proceeds flatly upon the ground that a shipment originating at a colliery in Pennsylvania, and destined and marked for the State of New York when delivered at the colliery by the shipper to the carrier for transportation, is in INTRASTATE commerce between the colliery and the scales in Pennsylvania, and beyond the scales is in INTERSTATE commerce, because the name and address of the individual consignee in New York were not disclosed until the car was weighed and way-billed at the scales.

12. That the decision, affirmed by the Court of Common Pleas, of Schuylkill County and by the Supreme Court of Pennsylvania, is not in concord with the decisions of your Honorable Court, which has repeatedly held that the interstate character of a shipment cannot be destroyed by ignoring either the point of origin or the point of ultimate destination, or the general nature of the traffic, and by treating what is merely a step in the transportation, as a completed journey.

13. That certain other like cases are pending in the Compensation tribunals and Courts of the State of Pennsylvania, and it, therefore, follows that, unless this Court shall correct the errors of the Courts below, your petitioner will be deprived of a right, privilege and immunity under the Federal Employers' Liability Act, in these and all similar cases brought hereafter in the State of Pennsylvania.

Wherefore your petitioner prays that a writ of *certiorari* may issue out of and under the seal of this Court, directed to the Supreme Court of the State of Pennsylvania, com-

manding that Court to certify the case to this Court for review and determination, as provided in the Act of Congress, known as the Judicial Code, or that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate, and in conformity with the said Act.

And your petitioner will ever pray, &c.

PHILADELPHIA AND READING RAILWAY COMPANY,

By

AGNEW T. DICE,
President.

[SEAL]

GEORGE GOWEN PARRY,
CHARLES HEEBNER,
Counsel for Petitioner.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss.*

AGNEW T. DICE, being duly sworn says that he is President of Philadelphia and Reading Railway Company, the petitioner named in the foregoing petition, that he has read the same, and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information and belief.

AGNEW T. DICE.

Sworn to and subscribed before me this 8th day of July A. D. 1919.

J. V. HARE,
Notary Public

[SEAL]

Commission Expires March 1, 1923.

In the Supreme Court of the United States.

OCTOBER TERM, 1919. NO. .

Philadelphia and Reading Railway Company, Petitioner,

vs.

Margaret L. Hancock, Respondent.

PETITIONER'S BRIEF ON APPLICATION FOR WRIT OF *CERTIORARI.*

The question involved in this case is of great importance not only to interstate carriers by railroad, and the employees of such carriers engaged in interstate commerce, but to those persons engaged in the trial of cases under the Federal Employers' Liability Act, and the Workmen's Compensation Act of Pennsylvania.

IS A BRAKEMAN ENGAGED IN INTERSTATE COMMERCE WHILE WORKING ON A TRAIN OF CARS WHICH WERE DESTINED, MARKED, AND EN ROUTE FROM A POINT IN PENNSYLVANIA TO POINTS IN NEW YORK, ALTHOUGH WAY-BILLS CONSIGNING THE CARS TO INDIVIDUAL CONSIGNEES HAD NOT YET BEEN ISSUED AND WERE NOT TO BE ISSUED UNTIL AFTER THE CARS PASSED THE RAILWAY SCALES?

Now the facts in the case are not disputed, the witnesses were all called by the claimant and there was no controversy either between them or between the claimant and defendant

with respect to the circumstances upon which the legal question arises. It is indisputable that it was the intention of the shipper, when on March 15th, 1916, it delivered these cars to the defendant's train crew for transportation, to send seven of them into the State of New York. It is indisputable that the code letters "M. C." were at that time upon the tickets covering these cars, thus disclosing this intention to the railway company's billing clerks at the Shamokin Scale, and it is indisputable that the cars were forwarded from the scale to consignees in New York on March 16th, the following day. But it is held by the Compensation Board and the learned Court below that the bare fact that the consignor intended this coal to be delivered to parties in the State of New York is not enough to give it the character of interstate freight, and authorities are cited in support of this contention. As an abstract proposition of law this principle is qualifiedly true. The bare fact, for example, that a certain pile of coal in the mines of the Philadelphia and Reading Coal and Iron Company was intended by it or even had been set apart by it to meet an order from the State of New York obviously would not of itself make employment in connection therewith an engaging in interstate commerce. On the contrary it would only be when that coal was delivered to the carrier that it acquired an interstate character. It was, however, this element of a mere intenton in the mind of the shipper which seemed to prevail with the Court below. This, however, is simply to beg the question for the intention was followed by complete and instant performance.

Since the Compensation Board found that these cars moved to points outside the State, but concluded that such movement was subsequent to the death of the claimant's husband, the question is when the interstate movement began and in its solution the shipper's intention may be a material factor.

We conceive the rule to be THAT AN INTERSTATE MOVEMENT BEGINS WHEN THE PROPERTY IS DELIVERED BY THE SHIPPER TO THE CARRIER FOR TRANSPORTATION, THE INTEN-

TION OF THE PARTIES BEING THAT THE SHIPMENT SHALL MAKE A PRACTICALLY CONTINUOUS MOVEMENT INTO ANOTHER STATE. These conditions are not only present here, but the intention of the parties was literally fulfilled.

The opinion below is clearly based on the theory that an interstate movement did not begin until the cars left Shamokin because until then the consignees were not named, and it was not until then that the title to the coal shifted from the shipper to the consignees. No case, however, is cited, and it is believed that none can be found in which this question of title has been held to be material. In an ordinary interstate shipment it often is the case that for business reasons the title to the freight consigned to a destined point is to remain in the shipper until payment; but surely, this question, material as it is between the consignor and consignee of the freight, has no relevancy and no importance in an issue between the carrier and its employees, where the sole question is whether the carrier and the employee are engaged in interstate transportation.

The case at bar, we submit is ruled by the following decisions:—

Baer *vs.* D. & R. G. R. R., 233 U. S. 479.

A shipper consigned a commodity from St. Louis, Mo., to Leadville, Col. It was transported over one railroad from St. Louis to Pueblo, Col., the receiving carrier giving a receipt showing that the commodity was to be delivered to the consignee at Leadville via another road. No through rate was established or no through bill of lading issued. The first company issued a bill of lading for the shipment from St. Louis to Pueblo at a local rate. The car was there delivered to another railroad company at a local rate, which company named to the consignee, the first railroad company as consignor. It was held by the United States Supreme Court that while there was no through rate or through route, there was in fact a through shipment from St. Louis, Mo., to Leadville, Col., and the interstate character of the shipment could not be destroyed by ignoring the point of origin and destination, separating the rate into component

parts and by charging local rates and issuing local way-bills and thus attempting to convert an interstate shipment into an intrastate shipment. Reversing 187 Fed. 485.

R. R. Commission of Louisiana *vs.* Texas & P. R. Co., 229 U. S. 336. Affirming 184 Fed. 989.

The shippers delivered to the carrier at certain stations in Louisiana 18 carloads of logs and staves to be transported to Alexandria, Louisiana, and there delivered to another railroad which transported them to New Orleans, La., where they were unloaded from the cars, put on board ships and exported to foreign countries. The bill of lading in each case provided for the delivery of the freight from the initial point to New Orleans, there to be delivered to the shippers' or consignees' order. The consignee, a broker, resided at New Orleans. Notwithstanding the bills of lading the stoves and logs were intended by the shippers for export. The sole question before the United States Supreme Court was whether the shipments were foreign or intrastate commerce while moving in Louisiana. The Court held they were foreign shipments and that the cargo took that character when it actually started from the intial point of its journey, although it was transported within the State under local bills of lading to New Orleans. The stoves and logs were intended by the shippers to be exported to foreign countries and though the transportation was interrupted at New Orleans it was only to the extent necessary for trans-shipment.

Ohio R. R. Commission *vs.* Worthington, 225 U. S. 101.

Coal is shipped by mine operators in Ohio to Huron, Ohio, a port on Lake Erie, marked simply "Lake coal" consigned to the mine operator or some office employee whose name is merely used for convenience. The operator then notifies the railroad that at a certain time a vessel will be at Huron to load so many tons of a certain grade of coal. The railroad company then picks up such cars of the operator's coal in the yard at Huron as are necessary to fill the

cargo, and moves them alongside the vessel, loads it and furnishes the shipper with a statement showing the car numbers and weights and total tons of coal in the vessel, on which information the bill of lading is made out. There is testimony to the effect that when the coal leaves the mines it is not known in what vessel it will be loaded nor to what ultimate destination it will go, and sometimes such coal is sold and vessel arranged for after the coal is at Huron. Some of this coal is sometimes diverted for local consumption at the port.

On this statement of facts the Supreme Court of the United States held: "By every fair test the transportation of this coal from the mine to Huron is an interstate carriage intended by the parties to be such." * * * "Much stress is laid in the argument for the commission that the coal is billed only to Huron and in that aspect of the case it is controlled by G. C. &. S. F. *vs.* Texas, 204 U. S. 403 * * * but there a new and independent contract for intrastate shipment was made, the interstate transportation having been completely performed; here a rate is fixed which includes the placing of coal in the vessels." * * * The test of through billing is not determinative.

Held that the commission's order fixing an intrastate rate on this traffic be enjoined as a direct attempt to regulate interstate commerce.

T. & N. O. R. Co. *vs.* Sabine Tram Co., 227 U. S. 111.

Lumber was shipped under local bills of lading from an interior point in Texas to a port in Texas where it was switched to the docks. The consignee presented the bills of lading, tendered the freight charges and demanded and received the lumber which he thereupon loaded on ships and sent to Europe. None of the lumber remained in the dock or in the slips longer than the time necessary to await the arrival of the ship chartered. Some of the lumber arrived before the ship was chartered and some afterward. The shipments having the character of interstate commerce after they passed out of the port, the question was when

they acquired it. Citing Coe *vs.* Errol, and Commission *vs.* Worthington, *supra*, the Supreme Court of the United States held that since the lumber was intended for export it was of no consequence that the original shipper had no concern with it after it reached the port. The shipment was not an isolated one, but typical of many others, and that it is the nature of the traffic and not its accidents which determines its character. That there must be continuity of movement we may conceive and to a foreign destination at the time of shipment. The determining circumstance is that the shipment of lumber to the port was but a step in its transportation to its real and ultimate destination in foreign countries. The conclusion is that the interstate movement began, not at the port, but at the point of origin and interstate rates must be applied between these points to the exclusion of rates established by the State Railroad Commission.

It is scarcely possible to conceive of cases more exactly in point and their application is sufficiently obvious. Here we have a case where the cars were intended by the shipper to go beyond the State to a certain locality; where they actually did go beyond the State to that locality in a practically continuous movement, and where the rate covered the whole journey from the colliery to the destination in New York. Where the movement was not an isolated one, but typical of many in a general and uniform course of business. The Court below ignored the general nature of this traffic and its determining circumstance, to wit; that the movement as far as Shamokin was but a step in the transportation to the real and ultimate destination in New York. Under any test that has ever been applied in the decisions of the Federal Courts, it is submitted, that the coal in the cars marked "M. C." started on its interstate journey the moment the cars left the colliery, and that any person engaged in the operation of a freight train of which these cars formed a part was engaged in interstate commerce within the meaning of the Federal Law. That clearly, therefore,

the decedent was engaged in interstate commerce at the time of his death, so that any right of action growing out of his death must be based upon the Federal Employers' Liability Act aforesaid, and not upon the Workmen's Compensation Act of the State of Pennsylvania.

It is respectfully submitted that writ of *certiorari* be granted as prayed for.

GEORGE GOWEN PARRY,
CHARLES HEEBNER,
Counsel for Petitioner.

APPENDIX.

PROCEEDINGS IN THE SUPREME COURT OF PENNSYLVANIA.

DOCKET ENTRIES.

64 *Margaret L. Hancock,*
Plaintiff

vs.

Jno. F. Whalen
George Gowen
Parry. *The Phila. & Read. Ry. Co.,*
Defendant.

Appeal of Defendant No. 234, March Term, 1918, from the judgment.

May 31, 1919. Writ of Error to the Supreme Court of the United States brought into office allowed to operate as a supersedeas by Hon. Mahlon Pitney, Associate Justice of the Supreme Court of the U. S.

May 10, 1919.

May 31, 1919. Bond for Fourteen Thousand ($14,000.00) Dollars brought into office approved by Hon. Mahlon Pitney, Associate Justice of the Supreme Court of the U. S.

May 31, 1919. Citation brought into office, with acceptance of service endorsed thereon.

May 31, 1919. Praecipe to bring up record filed.

June 2, 1919. Assignments of Error filed.

Appeal from Court of Common Pleas of the County of Schuylkill, Filed May 13, 1918.

Eo die certiorari exit.

Retble. third Monday February 1919.

Feb. 6, 1919. Assignments of Error filed.

Eo die. Record returned & filed.

Feb. 6, 1919. Petition of the appellant for leave to bring up the notes of testimony with the record filed.

Feb. 10, 1919. Answer of Appellee to petition for leave bring up the notes of testimony with record filed.

Feb. 10, 1919. Petition denied *Per Curiam.*

Feb. 17, 1919. Motion to quash appeal filed.

Feb. 17, 1919. Argued.

March 24, 1919. Appeal dismissed and award affirmed. *Per Curiam.*

March 31, 1919. Petition for reargument filed.

April 14, 1919. Reargument refused. *Per Curiam.*

April 16, 1919. Petition for Writ of Error filed. George Gowen Parry, Attorney for Petitioner.

Apr. 21, 1919. Writ denied Brown, C. J.

June 2, 1919. Petition for Writ of Error to the Supreme Court of Pennsylvania, brought into office.

June 2, 1919. Proof of service of copy of praecipe indicating portions of record to be incorporated into transcript of record filed.

June 9, 1919. Objections to praecipe Filed. L. L. Frank R. A. Reick.

June 9, 1919. Answer to Claim Petition (copy) (Part of Record) filed.

June 9, 1919. Transcript of Record exit & sent to James D. Maher, Clerk Supreme Court of United States.

OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

Margaret L. Hancock,

vs.

Philadelphia and Reading Railway Company, Appellant.

January Term, 1919.

No. 64.

APPEAL FROM C. P. SCHUYLKILL.

Per Curiam:

The sole contention of the appellant is that at the time the deceased was killed he was engaged in moving interstate commerce cars. This was a question of fact, and the finding of the Compensation Board was that the cars of coal in the trains upon which the deceased was working were being transported from the mines to different yards within the State, for the convenience of the shipper, and the subsequent shipments of any of them upon which the deceased had worked to a point without the State were made after his death and after the train crew with which he had worked had severed its connection with the cars. This finding was conclusive upon the learned Court below: Poluskiewicz *vs.* Philadelphia and Reading Coal and Iron Company, 257 Pa. 305.

Appeal dismissed and award affirmed.

OPINION OF THE WORKMEN'S COMPENSATION BOARD OF PENNSYLVANIA.

This opinion will be found on page 5 of the Paper Book of the appellant filed in the Supreme Court of Pennsylvania and attached hereto.

OPINION OF THE COURT OF COMMON PLEAS OF SCHUYLKILL COUNTY, PENNSYLVANIA.

The opinion of the Court of Common Pleas will be found on page 21 of the Paper Book of appellant filed in the Supreme Court of Pennsylvania and attached hereto.

FILED
OCT 2 1919
JAMES D. MAHER,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 415.

PHILADELPHIA AND READING RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MARGARET L. HANCOCK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

MOTION TO DISMISS OR AFFIRM FOR WANT OF JURISDICTION, AND BRIEF AND ARGUMENT IN SUPPORT THEREOF.

HANNIS TAYLOR,
Counsel for Margaret L. Hancock,
Defendant in error.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 415.

PHILADELPHIA AND READING RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MARGARET L. HANCOCK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

MOTION TO DISMISS OR AFFIRM FOR WANT OF JURISDICTION, AND BRIEF AND ARGUMENT IN SUPPORT THEREOF.

Comes now the defendant in error, by her counsel, and moves the court to dismiss the writ of error in this case for want of jurisdiction or to affirm the judgment in question, for the following reasons:

I

Because the judgment of the Supreme Court of Pennsylvania to which said writ of error was directed involves

only questions of State law, which have been passed on and affirmed in favor of defendant in error by four courts of that State.

II

Because the judgment of the said Supreme Court to which said writ of error was directed involves no question of Federal law, and no question of fact over which this court has jurisdiction.

III

Because it is manifest that said writ of error was taken out for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument. For that reason defendant in error moves the court to affirm the judgment, with costs, and ten (10) per cent damages.

In support of the foregoing motion, the following brief and argument is herewith submitted.

HANNIS TAYLOR,
Counsel for Margaret L. Hancock,
Defendant in Error.

BRIEF IN SUPPORT OF THE FOREGOING MOTION

STATEMENT OF THE CASE.

On March 15th, 1916, while the train crew, of which John R. Hancock was a member as brakeman, were bringing out coal cars, on plaintiff-in-error's railroad, from Locust Gap Colliery to Locust Summit, both points being within the State of Penn ylvania, he received injuries of which he died shortly thereafter. On July 29th, 1916, Margaret L. Hancock, widow of deceased, filed a claim petition for damages under the Workmen's Compensation Act of that State with the Workmen's Compensation Bureau, alleging that her husband had died as the result

of an injury occurring in the course of his employment on said railroad. On August 18th, 1916, an award of compensation was made against said plaintiff for $5,769.64, from which it appealed to the Workmen's Compensation Board, which, after hearing the case *de novo*, made on February 14th, 1918, an award against said plaintiff of $6,272.39. An appeal was then taken by said plaintiff to the Court of Common Pleas of Schuylkill County which duly affirmed the award of the Workmen's Compensation Board. Finally an appeal was taken by said plaintiff from the judgment of the Court of Common Pleas to the Supreme Court of Pennsylvania which, on March 24th, 1919, dismissed the appeal and affirmed the award in a *Per Curiam* opinion in which the court declared that "The sole contention of the apellant is that at the time the deceased was killed he was engaged in moving interstate-commerce cars. THIS WAS A QUESTION OF FACT, and the finding of the Compensation Board was that the cars of coal in the train upon which the deceased was working were being transported from the mines to different yards within the State, for the convenience of the shipper, and that the subsequent shipments of any of them upon which the deceased had worked to a point without the State *were made after his death and after the train crew with which he had worked had severed its connection with the cars.* This finding was conclusive upon the learned court below: Poluskiewicz *v.* Philadelphia & Reading Coal and Iron Company, 257 Pa., 305."

Thus it appears that four different State tribunals—the Workmen's Compensation Referee; the Workmen's Compensation Board; the Court of Common Pleas of Schuylkill County; and the Supreme Court of Pennsylvania—after careful examination, *have adjudicated the facts of this case in favor of defendant in error.* The highest court of the State in question has adjudicated *that only a question of fact is involved;* "that the subsequent shipments of any of them [cars] upon which the deceased had

worked to a point without the State *were made after his death and after the train crew with which he had worked had severed its connection with the cars.*" Under such conditions this defendant in error has been hindered and delayed for three years and a half in her effort to recover compensation for her husband's death.

I

A FRIVOLOUS APPEAL—NO FEDERAL QUESTION INVOLVED. No more unjustifiable or frivolous appeal was ever submitted to this court. The argument to be made in support of it is embodied in the brief annexed to a petition for certiorari to be submitted in connection with this writ of error. This argument in behalf of this defendant in error is respectfully submitted as a reply to both. The short answer to the cases on which the plaintiff in error relies is this: *In all of them the directions given to the carrier were full and complete at the time of shipment, and, if no further directions were given by the shipper, they could have been delivered at their destination outside of the State of shipment.* In this case the only thing that can be said to distinguish the cars in question were the letters M. C. They were plainly consigned from the Coal and Iron Company from Locust Gap Colliery to itself at Shamokin Scale, both places within the State of Pennsylvania. Suppose nothing further had been done or no other instructions given, where would the cars have been delivered and to whom? As a matter of course to the Coal and Iron Company at Shamokin Scale. There was nothing about the character of the shipment that would have prevented the shipper from sending these cars to any place in Pennsylvania, so far as directions to the carrier were concerned, up to the time he ordered them sent to various persons outside of the State, *and that was the day following the day on which Hancock met his death.* On p. 4, in the petition for certiorari, 13th line from the bottom, occurs this misleading statement:

"which indicated that the car so marked was to go to a point on the New York Central Railroad, outside of the State of Pennsylvania." The testimony does not justify that statement; its furtherest limit was that the letters M. C. indicated that the car was to go to a point on the New York Central Railroad. On the same page, in the 8th line from the bottom, appears the following: "which were returned to the Colliery." In that connection they were speaking of the tickets; they were not returned to the Colliery, and there is no testimony to that effect.

II

RECENT DECISIONS OF THIS COURT FIXING THE FACT THAT THIS APPEAL IS FRIVOLOUS. At its last term, in Pure Oil Co. *v.* Minnesota in MS., this court, in passing upon just such a writ of error as this one, said: "Neither is it necessary to consider whether the evidence sustains the contention that the inspection of gasoline provided for by the act was of a character such that it did not serve to promote the public safely or to protect the community against fraud and imposition. *The finding of fact by the trial court, approved by the Supreme Court of the State, is accepted as conclusive by this court.* Northern P. R. Co. *v.* North Dakota, 236, U. S. 585, 593." In Chicago, R. I., and P. R. *v.* Maucher, in MS., this court held that a frivolous Federal question was presented by a writ of error involving the contention that since the Carmack Amendment of June 29th, 1906, the Federal law governs the right of a circus employee injured in a railroad collision to recover damages from the railway company which was hauling the circus train in interstate commerce, where the contract of employment and the contract between the circus company and the railway company released the latter from liability for negligence. In Oelwerke Teutonia *v.* Erlanger and Galinger, in MS., this court said: "It is unnecessary to say more about the evidence than that it shows no ground for departing

from the usual rule when *two* courts have agreed about facts." In this case *four courts* "have agreed about the facts."

More conclusive still is the judgment of this court in Southern Pacific Co. *v.* Arizona in MS., a writ of error to the highest court of that State in which it was directly adjudicated (Co-op. H. N): "*I. Whether a shipment was at a given time in interstate commerce is a question of fact.*" Before the writ of error in this case was applied for this court had disposed of *the purely fanciful theory upon which it is based* by adjudicating in the case just cited: "The mere intention of the shipper to ultimately continue his tour beyond the State of Arizona did not convert the contemplated intrastate movement into one that was interstate. The case is ruled by Coe *v.* Errol, 116 U. S. 517; Chicago, M. & St. P. R. Co. *v.* Iowa, 233 U. S. 334; Gulf, C. & S. F. R. Co. *v.* Texas, 204 U. S. 403; Arkadelphia Mill Co. *v.* St. Louis S. R. Co., decided March 3d last." As the matter is more fully stated in the Co-op. H. N.: "*The mere intention of the owner of a carnival show equipment to continue his tour beyond the State* did not convert a contemplated movement of the show between two points within the State into *an interstate movement* so as to preclude the State from requiring that the transportation service between such points to be performed by a carrier, and fixing the rate chargeable by the carrier for such service." It was therefore held in that case, which is conclusive of this, that the writ of error therein presented a "frivolous question." In the words of the Co-op. H. N.: "ERROR TO STATE COURT—SCOPE OF REVIEW—FRIVOLOUS QUESTION. See to the same effect U. S. Fidelity and Guaranty Co. *v.* Oklahoma in MS., in which it was held that the writ of error to the highest court of that State presented a frivolous Federal question.

III

WHY THE PENALTY FOR A FRIVOLOUS APPEAL SHOULD BE ENFORCED IN THIS CASE. The State statute under

which this suit was begun, like all others of its kind, was intended to relieve the laboring poor of the intolerable burdens of prolonged and expensive litigation when compensation for the death of the breadwinner of the family is sought. The plea of Richard D'Anesty, which "followed the person of the king" for five years, brought about that chapter of *Magna Carta* which provided that common pleas should be held in a fixed place. The four years during which this poor widow of a laboring man will be debarred of her rights by a rich and powerful corporation, *against which four judgments have been rendered by the courts of Pennsylvania*, have inflicted, no doubt greater hardships upon her than were endured by D'Anesty. The judgment of this court in Southern Pacific Co. *v.* Arizona, rendered and recorded before this writ of error was sued out to induce this court to reverse a judgment, *after four courts* had agreed upon the facts—*the only matter in issue*—brands this appeal as not only frivolous, but vexatious in the highest sense of that term. By such appeal this poor widow has been compelled to assume the expense of employing special counsel in this court. In Nelson *v.* Flint, 166 U. S. 276, this court said: "The defendant in error, plaintiff below, asks this court to add 10 per cent damages, on the ground of the frivolousness of the error alleged, and because the suing out of the writ of error was for delay. Under clause 2 of rule 23 of this court we think this application should be granted. *The judgment is affirmed, with costs, and 10 per cent damages.*" The vexatious and unjustifiable delay, with its consequent expense, which this poor widow has suffered certainly entitles her to a like judgment. We therefore pray that such a judgment be entered in her favor in this case.

Humbly submitted.

HANNIS TAYLOR,
Counsel for Margaret L. Hancock,
Defendant in error.

Notice of Submission of Motion.

To Messrs. George Gowen Parry and Charles Heebner, 415 Reading Terminal, Philadelphia, Pa.

Please take notice that on Monday, October 27, 1919. at the opening of the court, or as soon thereafter as counsel can be heard, the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for the decision of the court under which motion is prepared, served and filed, and will be heard in the first instance on a printed brief or argument, hereto attached, as hereinafter stated; all as provided by subdivision 4, of Rule 6, of the Rules of said Court.

Annexed hereto is a copy of the brief or argument to be submitted with the said motion and in support thereof.

HANNIS TAYLOR,
Counsel for Margaret L. Hancock,
Defendant in error.

Received this——day of October, 1919, notice of said motion, together with a copy of the brief in support thereof with notice of the submission of said motion.

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_____

Counsel for Plaintiff in error.

No. 413

IN THE

Supreme Court of the United States

PHILADELPHIA AND READING RAILWAY COMPANY,
Plaintiff in Error,

vs.

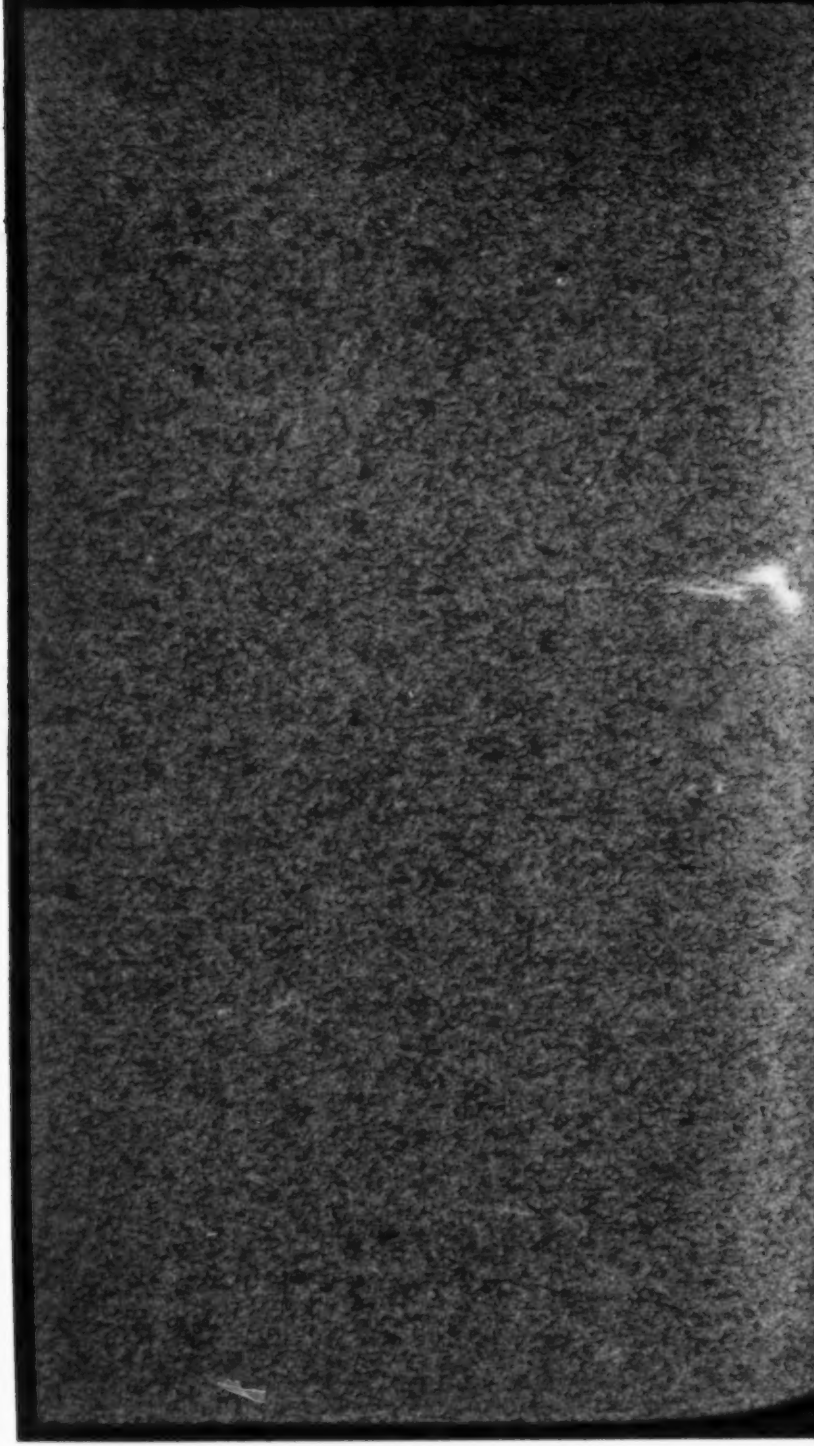
MARGARET L. HANCOCK.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR CONTRA-
MOTION TO DISMISS OR AFFIRM FOR
WANT OF JURISDICTION.

GEORGE GOWEN PARRY,
Counsel for Philadelphia and Reading Railway Company, Plaintiff in Error.

Allen, Lane & Scott, Pas., Philadelphia.



In the Supreme Court of the United States.

OCTOBER TERM, 1919. No. 415.

Philadelphia and Reading Railway Company, Plaintiff in Error,

vs.

Margaret L. Hancock.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR, CONTRA MOTION TO DISMISS OR AFFIRM FOR WANT OF JURISDICTION.

In support of the motion to dismiss the writ of error allowed by a Justice of your Honorable Court three reasons are assigned, two of which are:—

1. That the judgment of the State Supreme Court involved only questions of State law.

2. That this judgment involves no question of Federal law and no question of fact over which this Court has jurisdiction.

If these be true plaintiff in error has surely been ill advised in seeking to bring its case here for review and determination. But not satisfied with thus denying the jurisdiction, counsel for the defendant-in-error in a third reason brands this appeal as frivolous and vexatious in the highest sense of the term and asserts that it was taken only to further delay and debar his client of her just rights. These are hard sayings to which we find but one adequate answer. They are not true.

We shall first deal with the third reason assigned in support of the motion to dismiss before proceeding to argue briefly the legal questions raised by the first and second reasons.

No doubt there has been delay in the movement towards the ultimate determination of the important question arising in this case, but we cannot permit to go unchallenged the unwarranted assumption that this delay is in any way attributable to the plaintiff in error.

John P. Hancock died on March 15, 1916, yet no claim was filed under the State Compensation Act, by counsel for the claimant, until July 29, 1916, three months and a half later. An answer was promptly filed, a hearing had within 2 weeks and on August 19, 1916, the day after the hearing, the Compensation Referee filed his decision. The defendant below promptly appealed yet the Compensation Board did not fix a time for argument until July, 1917. Counsel for the claimant then appeared and requested a continuance to enable him to prepare a petition for a hearing *de novo*. As the result of his application the Compensation Board heard the case *de novo* on January 16, 1918, but did not decide it till a month later. Defendant below appealed within 10 days to the County Court, which promptly heard the appeal and made its desion on April 22, 1918. The appeal to the Supreme Court of Pennsylvania was argued at its next term for Schuylkill County appeals, February, 1919.

Had claimant's counsel promptly ordered the case down for argument before the Compensation Board, as he might

well have done, instead of waiting for 19 months after the appeal from the referee, the case could easily have been heard in the Supreme Court of Pennsylvania in February, 1917, and two full years had been saved.

It thus appears that the complaint of delay, urged by the distinguished counsel who now appears for the defendant in error, might be made to his colleague below with more propriety than to this Honorable Court. Nor do we think an appeal should be denounced in unmeasured terms as frivolous, which for every position asserted cites in support a pertinent decision of the highest Court in the land.

A number of cases are cited as fixing the fact that this appeal is frivolous. In but one of them, Nelson *vs.* Flint, 166 U. S. 276, did this Court so find, and we respectfully submit that it in no way resembles the case at bar.

In the first division of the brief in support of the motion to dismiss, the learned counsel for the defendant in error asserts that the argument in support of the appeal is embodied in the brief annexed to the petition for certiorari submitted on October 6, 1919. If he means the only argument he is mistaken. Four cases are there cited as decisive of the question of law involved should this Court take jurisdiction by certiorari. It is true that they are equally decisive of that question should your Honors take jurisdiction by writ of error, but in the petitioner's brief upon certiorari it could not properly, and therefore did not attempt to, argue the question of jurisdiction by writ of error.

The learned counsel for defendant-in-error is also mistaken in this assertion, quoted from page 4 of his brief:—

> "The short answer to the cases on which the plaintiff in error relies is this: *In all of them the directions given to the carrier were full and complete at the time of shipment, and if no further directions were given by the shipper, they could have been delivered at their destination outside of the State of shipment.*"

The cases cited are:

Baer *vs.* D. & R. G. R. R., 233 U. S. 479;
R. R. Commission of Louisiana *vs.* T. & P. R. R., 229 U. S. 336;
Ohio R. R. Commission *vs.* Worthington, 225 U. S. 101;
T. & N. O. R. R. *vs.* Sabine Tram Co., 227 U. S. 111.

As to the first, the Baer case, the only part of the journey claimed to be intrastate was at the latter end, made under a local way bill and rate between points in the State of Colorado, and the shipper at origin in St. Louis, Mo., doubtless did name the final destination, although that fact in no way vitiates the case as an authority here. But as to the other three cases the statement in italics is quite at variance with the facts reported. In the Louisiana case the destination named was New Orleans. In the Ohio case it was Huron, Ohio, and in the Sabine Tram case it was Sabine, Texas. In each of them the transportation in the State was held to be a part of an interstate journey because the shipments were destined to go and did go beyond the State destinations named. In the third case (Worthington) the intention being disclosed merely in a general way by the designation "Lake Coal," and further directions had to be given by the shipper.

Counsel for the defendant in error then complains that the brief for petitioner on *certiorari* misstates the facts and that the testimony does not justify the statement that the letters "M. C." indicated that the car so marked was to go outside the "State." A glance at the testimony will show that he is again mistaken. On page 22 of the "Transcript of Record" the witness Constantine states "M. C." means to furnish a New York Central car or car suitable to load to Buffalo Dock. The witness Quirk, the consignor's shipping clerk, who produced the car tickets under subpoena of the claimant below, testified, Transcript of Record, page 25, " 'M. C.' stands for out of State points on the New

York Central; out of Pennsylvania, State of New York," and he repeated this statement on pages 26, 27 and 28. This was the claimant's own proof.

Much stress is laid on the assertion that four State Courts have already determined the question of fact against Plaintiff in error. This is inaccurate, the Compensation Tribunals of Pennsylvania are not Courts; they are not even exclusively composed of persons learned in the law. The Referee however found facts that incontrovertibly support the contention of the plaintiff in error, defendant below. In his opinion (page 7a of Appendix to Defendant's paper book in the Supreme Court of Pennsylvania, attached to the petition for *certiorari*) he finds:—

> "(*e*) That this train consisted of 12 loaded cars, seven of which were destined and en route from Locust Gap Colliery to points outside of the State of Pennsylvania, to wit, Webster, Rochester, Canandaigua and North Tonawanda, New York, and Burlington, Vermont. The remaining cars in the train were bound to points within the State of Pennsylvania."

The Compensation Board made new findings of fact which are self contradictory, but it nevertheless appears from its opinion, (pages 7 and 13 of Appellant's Paper Book in the Supreme Court of Pennsylvania, attached to the petition for *certiorari*), that certain of the cars were marked "M. C." and this marking indicated that the cars were destined to go to points out of the State.

The Court of Common Pleas of Schuylkill County held that certain of the findings of the Compensation Board disposed of the question and the Supreme Court of Pennsylvania refused to review the facts holding that one finding of the Compensation Board was conclusive on the Court below. It thus appears that of the four tribunals, two disagreed on the facts and one, and that the highest, refused to even look at them.

The plaintiff-in-error complains of this refusal for it was impossible for the Supreme Court of Pennsylvania to

determine the Federal questions involved without reviewing the facts. If the evidence supported the finding of fact relied on by the Supreme Court of Pennsylvania this appeal would be simply grotesque. The truth is that the decisions below do not reach the merits of the case. The Compensation Referee found the facts correctly, but erred in the law. The Compensation Board on a hearing *de novo* made findings without evidence to support them, which findings the Courts below held to be controlling. The Court of Common Pleas adopted the law of the Compensation Board which was clearly erroneous even upon the findings made; and the Supreme Court of Pennsylvania refused to examine the facts at all, citing in support of its position the case of Poluskiewicz *vs.* Philadelphia and Reading Coal and Iron Company, 257 Pa. 305, in which it was held that the findings of fact of the Workmen's Compensation Board are final and not subject to review by the Courts, although in that case no Federal question was raised.

Whether under the actual facts of the case, Hancock was engaged in interstate commerce at the time he was killed is a Federal question, and since it is urged that the Plaintiff-in-error is precluded from arguing that question in this Court by the finding of fact below, the Federal question is raised that the finding that Hancock was engaged in intrastate and not in interstate service is without any evidence to support it, and because of this finding without evidence the due process clause of the Federal Constitution is violated.

On page 5 of the brief for defendant in error the case of N. P. R. R. *vs.* North Dakota, 236 U. S. 585, 593, is cited thus:—

> "The finding of fact by the trial court approved by the Supreme Court of the State, is accepted as conclusive by this Court."

But in the official report of the case the language of Mr. Justice Hughes speaking for the Court reads (page 593):—

"This Court will review the findings of fact by a State Court (1) where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary in order to pass upon the Federal question, to analyze the facts."

No stronger authority could be desired for the position urged by the plaintiff in error and other decisions of equal force follow.

In Kansas City So. Ry. Co. *vs.* C. H. Albers Commission Co., 223 U. S. 573, the railway company sought to prove that it could not legally give a shipper a rate of eight cents, in accordance with a special oral agreement, when there was a legally published tariff rate of fourteen cents applicable. The Kansas Supreme Court found as a fact that the eight-cent rate was the one applicable. On appeal to the United States Supreme Court the appellee contended this fact as found by the State Court was conclusively established. The Court laid down the law, as follows, at pages 591, 592:—

"While it is true that, upon a writ of error to a State Court we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the Federal right set up by the unsuccessful party, it is equally true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter. That this is so is amply shown by our prior rulings. Thus, in Mackay *vs.* Dillon, 4 Howard 421, 447, where the State Courts had given to certain evidence an effect claimed to be unwarranted by an applicable law of Congress, it was held that their

decision 'on the effect of such evidence may be fully considered here.' In Dower *vs.* Richards, 151 U. S. 658, 667, where the conclusiveness of findings of fact by a State Court was elaborately considered, it was recognized that where the question is 'of the competency and legal effect of the evidence as bearing upon a question of Federal law the decision may be reviewed by this Court."

The Court then proceeded to examine the evidence in order to determine whether what purported to be a finding of fact was not so involved with and dependent upon, questions of Federal law, as to be really a decision thereof. It concluded that the special agreement was void, that the established rates were unaffected by it, that the rate collected by the railroad was the applicable legal rate, and that the finding and judgment should have been in favor of and not against the railroad. The judgment of the Supreme Court of Kansas was reversed.

In Stanley *vs.* Schwalby, 162 U. S. 255, 274, 277-279, which was an action of ejectment, the validity of an authority exercised under the United States was drawn in question and depended upon whether the United States had a good title to the land in controversy. That question turned upon whether the attorney for the United States, who had represented it in the acquisition of the land, knew at the time of a prior deed to one McMillan, and the State Court found that he had such knowledge. In this Court it was insisted, on the one hand, that the finding was conclusive, and, on the other, that the evidence was insufficient, as matter of law, to warrant the finding, and could be examined to determine whether this was so. In that connection this Court, although recognizing the general rule that findings upon pure questions of fact are not open to review, said (page 278): 'But so far as the judgment of the State Court against the validity of an authority set up by the defendants under the United

> States necessarily involves the decision of a question of law, it must be reviewed by this Court, whether that question depends upon the Constitution, laws or treaties of the United States, or upon the local law, or upon principles of general jurisprudence.' And, upon examining the evidence, this Court held it to be 'wholly insufficient, in fact and in law, to support the conclusion that the attorney had any notice of the previous deed to McMillan,' and accordingly reversed the judgment of the State Court."

It has been distinctly recognized that orders or findings of administrative bodies are void if the finding was contrary to the indisputable character of the evidence.

In Interstate Commerce Commission *vs.* Louisville & Nashville R. R., 227 U. S. 88, Mr. Justice Lamar said:—

> "A finding without evidence is arbitrary and baseless. It would mean that where rights depended upon facts, the commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

In Louisville & Nashville R. R. *vs.* Finn, 235 U. S. 601, it was held that there was substantial evidence to support the order, but the Court said:—

> "It has been repeatedly held by this Court that an administrative order made indisputably contrary to the evidence, or without any evidence, must be deemed to be arbitrary and therefore subject to be set aside."

In Philadelphia & Reading Ry. *vs.* United States, 240 U. S. 334, Mr. Justice McReynolds, speaking for the Court, said:—

> "As the facts reported afforded no foundation for the commission's findings, enforcement of the order based thereon must be enjoined."

The principle that erroneous decisions of State Courts do not work a denial of due process is to be limited to questions involving conformity with the State Constitutions and laws, matters upon which the decision of the State Courts is final; and even in such a case the decision must not deprive a person of those fundamental rights guaranteed by the Constitution which may be infringed by the conduct of the Court in its administration of the law as well as by the law itself under which the Court is proceeding.

McGehee on Due Process of Law, page 41.

Upon all questions involving merely the conformity of the act with the Constitution of the State, the decision of the highest State Court is final and conclusive. But when the State decision is against the validity of a right claimed under the Federal Constitution or laws, the denial of due process under the national Constitution becomes a question.

Green Bay *vs.* Patten Paper Co., 172 U. S. 58.

> Due process of law is not judicial process. No one has a vested right to a particular remedy. "The state has full power over the procedure in its courts subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution." Brown *vs.* New Jersey, 175 U. S. 172.

An examination of the evidence in this case will, we think, demonstrate that what purports to be a finding of fact is so involved with, and dependent upon, questions of Federal law as to be really a decision thereof. We think it will further be found that the evidence is wholly insufficient in fact and in law to support the conclusion that Hancock and his employer were, at the time he was injured, engaged in intrastate and not in interstate commerce.

For the facts in the record which go to determine whether Hancock was engaged in interstate commerce at the time he was killed are to be passed upon by the standards of the federal law found in the acts of congress and the decisions of the federal courts. So it appears that there is a federal question to be decided in passing upon the evidence which is the foundation of the claim presented below by the defendant in error.

The brief in support of the motion to dismiss is submitted by counsel for defendant in error as a reply to both the petition for *certiorari* and the writ of error in this case. It seems hard that he should deny our right to come here under any provision of the amendment of 1916 to the Judicial Code. The denial of a right, privilege and immunity under the Federal Employers Liability Act would seem firm ground upon which to base a petition for *certiorari* and if there be any difficulty in the way of arguing that question by reason of a finding of fact called by the State Courts conclusive, then, if that finding really involves a conclusion of Federal law, and is without evidence to support it, a constitutional question is raised under the due process clause of the Fourteenth Amendment to the Federal Constitution. It would seem then, that, under either aspect of the case presented to this Court, there is a Federal question involved within the jurisdiction of the Court to consider and determine.

It is humbly submitted that the motion to dismiss or affirm for want of jurisdiction should be denied.

GEORGE GOWEN PARRY,
Counsel for Philadelphia and Reading Railway Company, Plaintiff-in-Error.

FILED
NOV 17 1919
JAMES D. MAHER,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 415.

PHILADELPHIA AND READING RAILWAY COMPANY,
Plaintiff in Error,
v.
MARGARET L. HANCOCK.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA,

Comes now defendant in error and moves the court to order this cause transferred for hearing to the summary docket because no extended argument can be necessary to settle the single question of fact involved. During the four years in which this defendant has been hindered and delayed in recovering for the death of her husband, the bread winner of the family, four courts have decided the single question of fact involved in her favor. Defendant therefore prays the court to prevent further oppressive delay by placing this cause on the summary docket.

Counsel for plaintiff in error will please take notice that on Monday, November 24, 1919, this motion will be submitted to the court.

HANNIS TAYLOR,
Counsel for Defendant in Error.

Received this.....day of November, 1919, notice of this motion.

In the Supreme Court of the United States.

OCTOBER TERM, 1919. No. 415.

Philadelphia and Reading Railway Company, Plaintiff in error

vs.

Margaret L. Hancock, Defendant in error

ON A WRIT OF ERROR TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

STATEMENT OF THE CASE.

This case comes before the Court on a writ of error from the Supreme Court for the Commonwealth of Pennsylvania to review a judgment of that Court affirming a judgment of the Court of Common Pleas of Schuylkill County, which affirmed an award of the Compensation Board of ~~the Workmen's Compensation Act for~~ the Commonwealth of Pennsylvania. The questions involved may be stated as follows:—

1. Whether the award of the Workmen's Compensation Board of the Commonwealth of Pennsylvania was in vio-

lation of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff-in-error of its property without due process of law.

2. Whether the Workmen's Compensation Act of the State of Pennsylvania of June 2, 1915, as interpreted by the judgment of the Supreme Court of Pennsylvania in this case is unconstitutional because as so interpreted it vests in the Workmen's Compensation Board the power to deprive a citizen of Pennsylvania of its property without due process of law.

3. Whether the judgment of the Supreme Court of Pennsylvania should be reversed because it affirms the judgment of the Court below sustaining the award of the Workmen's Compensation Board in favor of the claimant, in spite of the record evidence that the claimant's decedent was engaged in interstate commerce at the time of the accident which caused his death.

The facts appearing upon the record before the Compensation Board are set forth in the brief filed for the plaintiff-in-error upon the writ of *certiorari* pending herewith, but for convenience they may be repeated as follows:—

Margaret L. Hancock filed a petition under the Workmen's Compensation Act to recover compensation for the death of her husband, a brakeman, employed by the defendant, Philadelphia and Reading Railway Company, who was killed on March 15th, 1916, while engaged in moving a coal train from Locust Gap Colliery to Locust Summit Yard, both on the line of the Philadelphia and Reading Railway.

In accordance with the usual practice, before the train started the shipping clerk of the Philadelphia and Reading Coal and Iron Company gave the railway train conductor a ticket for each car, which described the car, its contents, capacity and the railway track scale where it was to be

weighed. It also gave the order number and code letters of the shipment. Seven of these tickets bore the code letters "M. C." which stood for "points on the New York Central Railroad, outside the State of Pennsylvania."

When the "M. C." cars and tickets reached the Shamokin Scale the following day, the name of the consignee and his address were entered on the tickets, which were returned to the colliery, and the cars were weighed, way-billed, and forwarded to individual consignees, the destination in each instance conforming to the direction given by the code letters on the car tickets.

This method of handling coal shipments has been followed for many years. The cars from the collieries in the vicinity are first taken to Locust Summit Yard, thence, those destined west to go to Shamokin Scale, and those for the east to St. Clair Scale. The correct freight rate cannot be applied until the cars are weighed and therefore the billing clerks are stationed at the weigh scales. The rate or freight charge covers the whole journey from the colliery to the final destination outside of the State of Pennsylvania.

The shipments are collected and concentrated in this way for convenience in railway operation, and to avoid the expense of maintaining track scales at each colliery.

The Compensation Board made an award to the claimant, and filed an opinion appearing in the record, pages 33 to 39. An appeal was taken to the Court of Common Pleas of Schuylkill County, Pennsylvania, alleging that the award was improperly granted because the record showed that the claimant's decedent was engaged in interstate commerce at the time of the accident. The Court of Common Pleas affirmed the award of the Compensation Board, and from this judgment an appeal was taken to the Supreme Court of Pennsylvania, in which Court a petition was filed praying that the Supreme Court examine into the evidence before the Compensation Board and reverse the judgment of the Court below. The Supreme Court of Pennsylvania refused to examine the evidence and rendered a judgment affirming the Court below, holding that the findings and award of

the Workmen's Compensation Board were conclusive upon both Courts, and that under the State Compensation Act the Court was without power to ascertain whether or not there were facts sufficient to justify the award made. It is to review this judgment that the plaintiff-in-error has secured the writ of error now before this Court.

SPECIFICATIONS OF ERROR.

I. The Supreme Court of Pennsylvania erred in affirming the judgment of the Court of Common Pleas of Schuylkill County, State of Pennsylvania, for the defendant-in-error, whereby the plaintiff-in-error was denied the right claimed by it under the due process clause of the 14th Amendment to the Constitution of the United States, that a judgment should not be entered against it based upon findings of fact without evidence to support them. The decision of the Supreme Court of Pennsylvania is as follows:—

> "Per *Curiam:*
>
> "The sole contention of the appellant is that at the time the deceased was killed he was engaged in moving interstate commerce cars. This was a question of fact, and the finding of the Compensation Board was that the cars of coal in the train upon which the deceased was working were being transported from the mines to different yards within the state, for the convenience of the shipper, and the subsequent shipments of any of them upon which the deceased had worked to a point without the state were made after his death and after the train crew with which he had worked had severed its connection with the cars. This finding was conclusive upon the learned Court below: Poluskiewicz *vs.* Philadelphia and Reading Coal and Iron Company, 257 Pa. 305.
>
> "Appeal dismissed and award affirmed."

II. The Supreme Court of Pennsylvania erred in ruling that the finding of the Workmen's Compensation Board "that the cars of coal upon which the deceased was working were being transported from the mines to different yards within the State for the convenience of the shipper," was conclusive upon the Court of Common Pleas of Schuylkill County, for the reason that the evidence shows no fact to support such a finding. (The decision of the Supreme Court of Pennsylvania is set out in full as part of the first assignment of error.)

III. The Supreme Court of Pennsylvania erred in refusing to examine or review the evidence for the purpose of determining whether or no the plaintiff-in-error was denied a federal right by the judgment of the Court of Common Pleas which was based upon findings of fact unsupported by any evidence.

IV. The Supreme Court of Pennsylvania erred in not ruling that the Workmen's Compensation Act of the State of Pennsylvania (Laws of 1915, page 736), was in violation of the Constitution of the United States in that it denies the plaintiff-in-error due process of law by failing to give the Courts of Common Pleas and the Supreme and Superior Courts of the State of Pennsylvania jurisdiction to consider a question of law arising upon the evidence, the said question of law being whether there was evidence to support the findings of fact upon which the judgment was based.

BRIEF OF ARGUMENT.

The record which is before this Court upon this Writ of Error would seem to show that to permit the judgment of the Supreme Court of Pennsylvania to stand would necessarily deprive the plaintiff-in-error of the right preserved to it by the 14th Amendment to the Constitution of the United States because by such judgment its property, to

the extent of the award made by the Workmen's Compensation Board of Pennsylvania, would be taken from it without due process of law.

The defendant-in-error has heretofore argued to this Court, upon the motion to dismiss or affirm for want of jurisdiction, that the judgment of the State Supreme Court involved only questions of State law, and that no question of Federal law and no question of fact over which this Court has jurisdiction is presented by the record. It is submitted that if the plaintiff-in-error is correct in its contention that the award made by the Workmen's Compensation Board of Pennsylvania is without evidence to support it, and contrary to the undisputed evidence that was presented, the judgment of the Supreme Court of Pennsylvania which affirmed this award was erroneous, and should be set aside.

This appeal is not intended to urge upon this Court that it has the jurisdiction to consider merely questions of interpretation of State laws by the Supreme Court of Pennsylvania, but it is for the purpose of asking the aid of this Court to protect against a decision of the Supreme Court of Pennsylvania which deprives this plaintiff-in-error of its property without due process of law.

The question which was before the Workmen's Compensation Board, and which was presented to the Supreme Court of Pennsylvania arose from the undisputed evidence in the record, and may be stated as follows:—

Is a brakeman engaged in interstate commerce while working on a train of cars which were destined, marked, and en route from a point in Pennsylvania to points in New York, although way bills consigning the cars to individual consignees had not yet been issued and were not to be issued until after the cars passed the railway scales?

The Compensation Board made certain findings which are to be found in the record pages 33 to 39. The findings of fact which are important for consideration now, are set forth in the record pages 33 to 38:—

"The shipping orders that reached the hands of the conductor of the train upon which the deceased was working contained no suggestion of a shipment beyond the State of Pennsylvania in direct words, but there were certain cars of coal in this train that had been ordered in the usual method as above described but upon the cards or memoranda that reached the conductor there were certain letters of a private code, indicating that a car to which the card was attached was intended eventually to be shipped outside of the State (Record, page 33).

"In order that the position of the defendant may be clearly stated let us refer to the exhibit which is the subject of the testimony on page 12. This fairly indicates the position of the defendant and a study of this shipping ticket will be conclusive on all the others. Form No. 1262, Serial Number 68, bears the date of March 15th, 1916, the day upon which the deceased was killed. In consequence of the order of procedure established between the coal company and the railroad company, as hereinbefore set out, this ticket was placed in the hands of the conductor at the mines, and indicated to him that this car Number 730455, loaded with stove coal, was to be moved by the Philadelphia and Reading Railway Company from Locust Gap Colliery to the Shamokin Scales and that his duty together with that of the deceased was to transport it as far as Locust Summit. His train, as usual, was to be broken up in the yard at Locust Summit and the cars placed upon tracks convenient for further transportation to either St. Clair or Shamokin Scales" (Record, page 34).

All then that was upon this ticket was the size of the coal, the number of the car, its initials, the capacity of the car and the number of the order. It will be noticed that under the number of the order are two letters "MC" (Record, page 34).

The part played by these letters in the final disposition of car Number 730455 is shown by the testimony.

These letters "MC" were placed upon this ticket in consequence of the orders telegraphed from Mahanoy Plane to the shipping clerk of the coal company at the mines and indicated that it was the intention of the shipper to eventually consign this particular car to a point without the State. This car was cut out of the train at Locust Summit and placed upon a switch in the yard where cars were assembled to be forwarded to Shamokin Scales.

It must be remembered that this shipment was from the Philadelphia and Reading Coal and Iron Company to itself. When the car reached its destination at the Shamokin Scales it was inspected, weighed and rebilled on the next day. Under the testimony there was no writing on the ticket below the double line. On the day after the deceased had been killed this car was billed to Ebner & Wahling, Webster, N. Y., via New York Central Railroad.

The course that this car took is typical of a number of others in the train. This one, however, is sufficient to characterize the whole train together with the work of the deceased as interstate business if it be determined that the interstate trip began at the mine" (Record, page 35).

"The shipment of that coal from the mine to the Shamokin Scales was at the pleasure and under the method of business of the shipper and was no different in character from any other movement of its own coal on its own property" (Record, page 36).

Referring to the above findings the Compensation Board said:—

We accordingly assemble the following facts and inferences as being, in our judgment, the ones material to this issue. Any other facts found by us in the foregoing discussion are to be considered however as findings of facts for the purpose of review (Record, page 37).

The Board also found as follows:—

4. The work of the deceased for the defendant never took him outside of the State of Pennsylvania and upon the date of his death there were no cars in the train upon which he was working which were consigned to any points outside of the limits of the State of Pennsylvania, although on certain cars the cards were marked "MC" as hereinbefore described (Record, page 37).

5. The cars of coal in the train upon which the deceased was working were being transported from the mines to different yards for the convenience of the shipper. The subsequent shipments of any of the cars in the train upon which the deceased was working to points without the State were made after the death of the deceased and after the train crew with which the deceased worked had severed its connection with the said cars (Record, page 37).

7. The code letters such as "MC" and "HA" as described in the testiomny were used by the employees of the Philadelphia and Reading Coal and Iron Company for their own convenience and for the purpose of expeditiously assembling certain cars at certain points without any necessary bearing upon the ultimate destination of the said cars, although clearly it was the intention of the shipper that such cars were to eventually reach points outside of the State" (Record, page 38).

The Compensation Board reached a conclusion of law as the result of these findings, which is set forth in the record on page 38:—

"Under the Pennsylvania Workmen's Compensation Act of 1915 the deceased was an employee within the meaning of Article III, Section 301, and his dependents are entitled to compensation according to the provisions of the said Act. Interstate commerce is

not a matter of intention, but of fact; and having found that the interstate shipment began at Shamokin Scales on the day after the deceased was killed, neither the deceased nor the defendant was engaged in interstate commerce at the time of the accident."

The appeal which was taken from the award based upon these findings of fact and conclusion of law to the Court of Common Pleas for Schuylkill County was disposed of by that Court as follows:—

"It will be seen that these findings of fact dispose of the question before us, for if they be correct, it is plain that the deceased was not engaged in the movement of cars in interstate commerce at the time he was killed. We have examined the record as transmitted to us from the Compensation Board and feel that there is ample evidence to sustain these findings of fact and that for the reasons given in an exhaustive and well-argued opinion by Mr. Chairman Mackey, the judgment of the Compensation Board should be affirmed" (Record, page 41).

This decision ignores the facts shown by the evidence presented to the Compensation Board and disregards the essential findings of fact which are included in the Opinion of the Board. It was because of the obvious insufficiencies in the judgment of the Court of Common Pleas that an appeal was taken to the Supreme Court of Pennsylvania, and this was disposed of in the following language:—

"Per *Curiam:*

"The sole contention of the appellant is that at the time the deceased was killed he was engaged in moving interstate commerce cars. This was a question of fact, and the finding of the Compensation Board was that the cars of coal in the train upon which the deceased was working were being transported from the mines to different yards within the state, for the con-

venience of the shipper, and that the subsequent shipments of any of them upon which the deceased had worked to a point without the state were made after his death and after the train crew with which he had worked had severed its connection with the cars. This finding was conclusive upon the learned court below: Poluskiewicz *vs.* Philadelphia & Reading Coal & Iron Company, 257 Pa. 305.

"Appeal dismissed and award affirmed."

FIRST QUESTION.

1. Whether the award of the Workmen's Compensation Board of the Commonwealth of Pennsylvania was in violation of the 14th Amendment to the Constitution of the United States in that it deprives the plaintiff-in-error of its property without due process of law.

The Court of Common Pleas of Schuylkill County selected certain findings of the Compensation Board which appeared to support the conclusion desired, considered them as final and ignored all the rest. It relied upon the Seventh finding, which follows:

> "7. The code letters such as 'MC' and 'HA' as described in the testimony were used by the employees of the Philadelphia and Reading Coal and Iron Company for their own convenience and for the purpose of expeditiously assembling certain cars at certain points without any necessary bearing upon the ultimate destination of the said cars, although clearly it was the intention of the shipper that such cars were to eventually reach points outside of the State."

There is absolutely no testimony to support anything in this finding except the last clause, "although clearly it was the intention of the shipper that such cars were to eventually reach points outside the State." On the contrary, every witness testified that the code letters had a very definite bear-

ing upon on the ultimate destination of the cars for they notified the railroad billing clerks at the scale that the cars marked "MC" had been shipped from the colliery for New York delivery and they constituted a direction to apply New York billing to those particular cars.

It is obvious that the code letters had and could have no bearing on anything else. The cars were assembled, as the testimony and other findings show, solely under the directions on the car tickets to take the cars to the scale. (Exhibits 1 to 13, Record, page 73, *et seq.*)

> "This ticket was placed in the hands of the conductor at the mines and indicated to him that this car was to be moved by the Philadelphia and Reading Railway Company from Locust Gap Colliery to the Shamokin Scales" (Findings, *supra*, page 7).

The cars were hauled to Locust Summit Yard not because of the code letters, but because that was Constantine's regular run and he hauled all cars there alike no matter what code letters the ticket bore and no matter whether they were bound east to St. Clair or west to Shamokin (Constantine's testimony, Record, pages 10, 11). They were placed on the yard tracks at that point in accordance with the yardmaster's orders, who was guided by the words Shamokin Scales or St. Clair Scales (Constantine's testimony, Record, pages 11, 12). The code letters M. C. were not used then for the purpose of assembling cars, but were put on the ticket by Quirk, the shipper's employee to "help the scale men out so they know what line to bill over (Quirk's testimony, Record, page 28). The tickets were all marked either "Shamokin Scales" or "St. Clair Scales" and this was the direction to the crew and yardmaster where to assemble the cars (Constantine, Record, pages 11, 12, 13 to 17). If the words M. C. did not have a bearing on the ultimate destination of the cars they were meaningless.

The testimony also will be scrutinized in vain for a

single expression that, even inferentially, supports the finding which was relied upon by the Supreme Court of Pennsylvania, that,

> "5. The cars of coal in the train upon which the deceased was working were being transported from the mines to different yards for the convenience of the shipper. The subsequent shipments of any of the cars in the train upon which the deceased was working to points without the State were made after the death of the deceased and after the train crew with which the deceased worked had severed its connection with the said cars."

On the contrary, the witness Quirk, the shipping clerk who had worked 14 years at the colliery, said with reference to the manner in which the cars were shipped,

> "It has been customary ever since I have been on the job and so it is with all shippers" (Record, page 67).

As a matter of fact, the cars are assembled at the different yards and scales as an incident in economical railroad operation and obviously since every shipper pays only the applicable tariff rate it is a matter of indifference to him, as long as the cars are handled with due dispatch, how or where they are assembled and weighed.

While it is true that Hancock was killed and his train crew had severed its connection with the train before it reached the scales, the finding that subsequent shipment of these cars was made to points outside the State is utterly misleading. The shipments were made when the cars were delivered to the railroad company at the colliery and although there was a subsequent weighing and billing, there was no subsequent shipment in the sense of a new and independent shipment, which is the sense placed upon the words in the finding, and in the opinion of the Supreme Court of Pennsylvania. In this connection the witness Quirk said (Record, page 28), in reply to the questions of the Chairman of the Compensation Board:—

"Q. When you send these trains out, then you know and you mark certain of them for points outside the State?

"A. Yes, sir.

"Q. You know that there is going to be practically a continuous journey of that car from your colliery to a point without the State?

"A. Yes, sir.

"Q. And the only interruption of that journey is to weigh them at the scales?

"A. Yes, sir."

This Fifth finding of the Compensation Board is the only finding referred to in the opinion of the Supreme Court of Pennsylvania where it is held to be absolutely conclusive, despite the fact that there is not a line in the testimony to support it, despite the further fact that the only testimony on the subject positively establishes the contrary and in utter disregard of other contradictory findings of the Compensation Board which necessarily must be equally conclusive.

The Compensation Board further found (Record, page 36),

> "The shipment of that coal from the mine to the Shamokin scales was at the pleasure and under the method of the business of the shipper and was no different in character from any other movement of its own coal on its own property."

This is a pure assumption and forms the only reason we can discover for the Fifth finding, relied on by the Supreme Court of Pennsylvania. There is not a word of testimony that even suggests such a condition of affairs, but there is much in this record to prove the finding false.

In the first place, the car tickets offered in evidence by the claimant show on their face that these cars were delivered to the railroad company at the colliery (Exhibits 1 to 13, Record, page 73, *et seq.*). At that moment the shipments passed from the custody and control of the

shipper to that of the carrier. The movement then was not by the shipper on its property but by the carrier on the carrier's railroad. Second, the carrier's lien had attached and could not be divested by any act of the shipper until the charges were paid. Third, while the train crew did not know to whom the cars were consigned, the carrier knew, for its billing clerks at the scale had the information and forwarded the cars to named consignees as soon as they reached the scale. Fourth, the method of business was the established customary method of the carrier and was not at the pleasure of the shipper at all.

It would seem then that this transaction was as widely different from a movement by the shipper of its own coal on its own property as the mind can well conceive.

Now these findings upon which the judgment below is based are, we submit, devoid of any foundation of fact. They are mere unauthorized assumptions and yet they go to the very crux of the question, for the whole case turns upon the point that the cars were destined and marked for New York when they were delivered to the carrier at the colliery. The findings held by the Courts below to be controlling, to wit, that the movement from the colliery to Shamokin scale was made for the convenience of the shipper, of its own coal on its own property, that the letters "MC" had no bearing on the ultimate destination of the cars and that the shipments were not made to points in New York until the cars left Shamokin scale are by themselves conclusive of the question.

These then, are the findings of which the plaintiff in error complains under the first and second specifications of error, in that the judgment entered upon them below deprives it of its property without due process of law.

> The principle that erroneous decisions of State Courts do not work a denial of due process is to be limited to questions involving conformity with the State Constitutions and laws, matters upon which the decision of the State Courts is final, and even in such a case the decision must not deprive a person of those

> fundamental rights guaranteed by the Constitution which may be infringed by the conduct of the Court in its administration of the law as well as by the law itself under which the Court is proceeding.
>
> **McGehee on Due Process of Law,** page 41.

> Upon all questions involving merely the conformity of the act with the Constitution of the State, the decision of the highest State Court is final and conclusive. But when the State decision is against the validity of a right claimed under the Federal Constitution or laws, the denial of due process under the national Constitution becomes a question for this Court.
>
> Green Bay *vs.* Patten Paper Co., 172 U. S. 58.

> Due process of law is not judicial process. No one has a vested right to a particular remedy. "The state has full power over the procedure in its courts subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution." Brown *vs.* New Jersey, 175 U. S. 172.

It is this qualification we think applicable here. The appellant is denied due process of law by a judgment based upon findings without evidence to support them.

The decision of the Workmen's Compensation Board, affirmed by the Court of Common Pleas, holds that Hancock was not engaged in interstate commerce and also that he was engaged in intrastate commerce, consequently that the Workmen's Compensation Act applies.

We contend that this decision is a denial of right under the XIV Amendment which insures the defendant against the taking of its property without due process of law. For the finding that Hancock was engaged in intrastate service is without any evidence to support it and because of this finding without evidence the due process clause is violated.

The distinction in this case between the refusal of the State tribunal to apply the provisions of the Federal statute to facts which might justify its application and the denial of due process of law lies in the fact that instead of the record showing evidence from which it might be found that there was an engaging in intrastate commerce at the time of the accident, the record shows no facts except those which conclusively prove an interstate movement of the train upon which Hancock was employed.

Under the due process clause the defendant is entitled to require that no judgment he entered against it except it be founded upon facts proved in accordance with recognized legal procedure for a decision which is a mere arbitrary conclusion without proven facts to support it constitutes a denial of the right protected by the XIV Amendment.

The defendant has urged throughout these proceedings that no award could be made against it consistently with the Federal Employers' Liability Act. This is an adequate assertion of a right or immunity under that Act, for it named the Act, indicated wherein it was claimed to be applicable, and invoked its protection. Kansas City Sou. Ry. *vs.* Albers Commission Co., 223 U. S. 573, citing Nutt *vs.* Knutt, 200 U. S. 12; Texas & Pacific Ry. *vs.* Abilene Cotton Oil Co., 204 U. S. 426.

The decision of the learned Court below adopts the opinion of the Compensation Board and we respectfully submit that a perusal of that opinion will abundantly show that the conclusions of law as to the Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question to analyze the facts. This can only be done by an examination of the notes of testimony.

In **Kansas City So. Ry. Co. vs. C. H. Albers Commission Co.,** 223 U. S. 573, the railway company sought to prove that it could not legally give a shipper a rate of eight cents, in accordance with a special oral agreement, when there was a legally published tariff rate of fourteen

cents applicable. The Kansas Supreme Court found as a fact that the eight-cent rate was the one applicable. On appeal to the United States Supreme Court the appellee contended this fact as found by the State Court was conclusively established. The Court laid down the law, as follaws, at pages 591, 592:—

> "While it is true that upon a writ of error to a State Court we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the Federal right set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter. That this is so is amply shown by our prior rulings. Thus, in Mackay *vs.* Dillon, 4 Howard 421, 447, where the State Courts had given to certain evidence an effect claimed to be unwarranted by an applicable law of Congress, it was held that their decision 'on the effect of such evidence may be fully considered here.' In Dower *vs.* Richards, 151 U. S. 658, 667, where the conclusiveness of findings of fact by a State Court was elaborately considered, it was recognized that where the question is 'of the competency and legal effect of the evidence as bearing upon a question of Federal law the decision may be reviewed by this Court.' In Stanley *vs.* Schwalby, 162 U. S. 255, 274, 277-279, which was an action of ejectment, the validity of an authority exercised under the United States was drawn in question and depended upon whether the United States had a good title to the land in controversy. That question turned upon whether the attorney for the United Staes, who had represented it in the acquisition of the land, knew at the time of a prior deed to one McMillan, and the State Court found that he had such knowledge. In this Court it was insisted, on the

one hand, that the finding was conclusive, and, on the other, that the evidence was insufficient, as matter of law, or warrant the finding, and could be examined to determine whether this was so. In that connection this Court, although recognizing the general rule that findings upon pure questions of fact are not open to review, said (page 278): 'But so far as the judgment of the State Court against the validity of an authority set up by the defendants under the United States necessarily involves the decision of a question of law, it must be reviewed by this Court, whether that question depends upon the Constitution, laws or treaties of the United States, or upon the local law, or upon principles of general jurisprudence.' And, upon examining the evidence, this Court held it to be 'wholly insufficient, in fact and in law, to support the conclusion that the attorney had any notice of the previous deed to McMillan,' and accordingly reversed the judgment of the State Court."

The Court then proceeded to examine the evidence in order to determine whether what purported to be a finding of fact was not so involved with and dependent upon, questions of Federal law, as to be really a decision thereof. It concluded that the special agreement was void, that the established rates were unaffected by it, that the rate collected by the railroad was the applicable legal rate, and that the finding and judgment should have been in favor of and not against the railroad. The judgment of the Supreme Court of Kansas was reversed.

In **Southern Pacific Co. vs. Schuyler,** 227 U. S. 601, 611, the Court said:—

It is insisted (*a*) that there is no presumption that the railroad company violated the prohibition of the Hepburn Act by granting to Schuyler a free interstate ride, and that there is no evidence in the record to support such conclusion; and while it is conceded that

ordinarily, upon writ of error to a state court, this court does not review the findings of fact, yet it is insisted that in this case a Federal right has been denied as the result of a finding of fact which is without support in the evidence; that the evidence is before us in the record by which that insistence may be tested; and that the status of Schuyler as an interstate passenger is a mixed question of law and fact so that it is incumbent upon us to analyze the evidence to the extent necessary to give to plaintiff in error the benefit of its asserted Federal right. The insistence as to the power and duty of this court in such a case is well founded. Kansas City Southern Ry. Co. *vs.* Albers Commission Co., 223 U. S. 573, 591; Cedar Rapids Gas Co. *vs.* Cedar Rapids, 223 U. S. 665, 668; Creswill *vs.* Knights of Pythias, 225 U. S. 246, 261. We also agree there is no presumption that the railroad company gave free transportation, and that this was a fact to be established by evidence. Accepting the duty to review this question of fact, we have examined the evidence in the record and find that it fairly supports the conclusion of the state court that the deceased was accepted by plaintiff in error as a gratuitous passenger.

In **Northern Pacific Ry. Co. vs. State of North Dakota,** and **Minneapolis, St. Paul and Sault Ste. Marie Railway Co. vs. Same,** 236 U. S. 585, the question was raised before the Supreme Court of the United States whether or not a certain rate fixed by the legislature of North Dakota was reasonable. The Court said, at page 593:—

"This Court will review the findings of facts by a State Court (1) where a Federal right has been denied as the resutl of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in

order to pass upon the Federal question, to analyze the facts. Kansas City Southern Ry. *vs.* Albers Commission Co., 223 U. S. 573, 591; Creswill *vs.* Knights of Pythias, 225 U. S. 246, 261; Wood *vs.* Chesborough, 228 U. S. 672, 678."

It has been distinctly recognized that orders or findings of administrative bodies are void if the finding was contrary to the indisputable character of the evidence.

In **Interstate Commerce Commission vs. Louisville & Nashville R. R.,** 227 U. S. 88, Mr. Justice Lamar said:—

> "A finding without evidence is arbitrary and baseless. It would mean that where rights depended upon facts, the commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

In **Louisville & Nashville R. R. vs. Finn,** 235 U. S. 601, it was held that there was substantial evidence to support the order, but the Court said:—

> "It has been repeatedly held by this Court that an administrative order made indisputably contrary to the evidence, or without any evidence, must be deemed to be arbitrary and therefore subject to be set aside."

In **Philadelphia & Reading Ry. vs. United States,** 240 U. S. 334, Mr. Justice McReynolds, speaking for the Court, said:—

> "As the facts reported afforded no foundation for the commission's findings, enforcement of the order based thereon must be enjoined."

SECOND QUESTION.

2. Whether the Workmen's Compensation Act of the State of Pennsylvania of June 2, 1915, as interpreted by the judgment of the Supreme Court of Pennsylvania in this case is unconstitutional because as so interpreted it vests in the Workmen's Compensation Board the power to deprive a citizen of Pennsylvania of its property without due process of law.

THE SUPREME COURT OF PENNSYLVANIA ERRED IN NOT RULING THAT THE WORKMEN'S COMPENSATION ACT OF THE STATE OF PENNSYLVANIA (LAWS OF 1915, PAGE 736), WAS IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES IN THAT IT DENIES THE PLAINTIFF IN ERROR DUE PROCESS OF LAW BY FAILING TO GIVE THE COURTS OF COMMON PLEAS AND THE SUPREME AND SUPERIOR COURTS OF THE STATE OF PENNSYLVANIA JURISDICTION TO CONSIDER A QUESTION OF LAW ARISING UPON THE EVIDENCE, THE SAID QUESTION OF LAW BEING WHETHER THERE WAS EVIDENCE TO SUPPORT THE FINDINGS OF FACT UPON WHICH THE JUDGMENT WAS BASED (Fourth Specification).

The judgment of the Supreme Court of Pennsylvania is wrong for either of two reasons, (*a*) it is wrong if it sustains the Workmen's Compensation Act of Pennsylvania of June 2, 1915, as interpreted by it, because, as so interpreted, the power is given under that Act of the State Workmen's Compensation Board to make arbitrary awards to claimants without evidence to support the claim. Or (*b*) the judgment of the Supreme Court of Pennsylvania is wrong if, with power to examine the evidence before the Workmen's Compensation Board, in passing upon the appeal pending before it, it refuses to exercise its power, which, if exercised, would have disclosed to that Court the absence of any evidence upon the record before the Compensation Board to sustain the award which was affirmed by the Court below.

(*a*) The essential portions of the State Compensation Act and the opinions of the Supreme Court of Pennsylvania interpreting that Act, and now to be read with it as the law of the State, are attached to this brief as exhibits, Appendix A, page 43, Appendix B, page 52, Appendix C, page 53. A brief examination of them will show wherein the Act is deemed to be unconstitutional:—

Section 409 provided that

> "The Referee's findings of fact shall be final unless the Board shall allow an appeal therefrom, as hereinafter provided. The Board's findings of fact shall in all cases be final. From the Referee's decision on any question of law an appeal may be taken to the Board and from any decision of the Board on a question of law an appeal may be taken to the courts as hereinafter provided" (Appendix A, page 44 of brief).

The Supreme Court of Pennsylvania in passing thereon said:—

> "Referees or the Workmen's Compensation Board must realize the great responsibility imposed upon them by the provision that their findings of fact are final. If they err in this respect, Courts can grant no relief to parties who may be wronged." Poluskiewicz *vs.* P. & R. C. & I. Co., 257 Pa. 305. (Appendix B, page 52 of brief.)

In this case the sole question was whether there was any evidence to support the finding of the Referee that the decedent died as the result of an accident suffered in the course of his employment.

Further construing the Workmen's Compensation Law, the Supreme Court of Pennsylvania, in its opinion filed in McCauley *vs.* Imperial Woolen Company, 261 Pa. 312 (Appendix C, page 53 of brief), said:—

"The real contention is an utter lack of legal evidence to sustain the referee's conclusion that the death of James McCauley was occasioned by an accident occurring in the course of his employment. In other words, the defendant employer does not controvert, as matter of fact, that McCauley's death was due to the cause set up by claimant, but denies there is any legal proof to show that this causal event, which is alleged as an accident happened while deceased was engaged in the course of his employment. This contention raises a question of law, which the board had power to determine under section 420, upon a consideration of the legal adequacy of the testimony taken before the referee; had the attack been simply upon the ground that the testimony was insufficient in fact to justify the latter's findings, and not that there was no legal evidence whatever to warrant them, a question of fact, not of law, would have been raised; and, under section 421, the board would have been obliged either to sustain the referee or grant a new hearing * * * (Appendix C, page 55 of brief).

The next matter for our consideration concerns the rights and duties of the common pleas upon the appeal to that tribunal from the decision of the compensation board. Section 409 of the Act of 1915, *supra*, provides that 'the board's findings of fact shall in all cases be final.....', [but] from any decision of the board on a question of law an appeal may be taken to the courts as hereinafter provided.' Section 425 (P. L. 754) provides that, if any party in interest desires to appeal from the decision of the board 'on matters of law,' he must file notice in the appropriate Court of Common Pleas, and, in such case, it shall be the duty of the Bureau of Workmen's Compensation to prepare and deliver to the prothonotary of the proper county 'a transcript of the.....finding of fact and award or disallowance of compensation, or modification thereof, involved in the appeal.'

As recently stated in Franklin Film Manufacturing Corporation, 253 Pa. 422, 426, 'at the present time, in our law, the word "appeal" has no conclusive meaning.....; therefore it is necessary in each instance to look at the particular act of assembly giving the right of appeal, to determine just what powers are to be exercised by the appellate court.'

The statute here in question makes no provision for bringing up the testimony to the courts by sealing a bill, certifying the record thereof, or other known method; more than this, the act particularly prescribes what shall be sent to the common pleas—significantly, in view of its provisions as to the finality of the findings of fact, omitting reference to the evidence taken before the referee or board—all of which makes it clear that the appeal to the common pleas contemplated by this statute is in the nature of a *certiorari*, the purpose probably being to prevent appeals to the courts, except for errors of law, and thus to hasten the final determination of claims under the act.

It may be noted that, if the legislature had desired the testimony in workmen's compensation cases brought up on appeal, by the courts, for consideration, it knew how to accomplish this end, as shown by Article VI, Section 18, of the Public Service Company Law (Act of July 26, 1913, P. L. 1374, 1425), where it is provided that, on such appeals from the utilities commission, the testimony shall be certified 'under seal,' as part of the record for consideration: see St. Clair Boro *vs.* Tamaqua & P. E. Ry. Co., 259 Pa. 462, 467. * * * (Appendix C, page 56 of brief).

As to the jurisdiction of the Supreme Court on the present appeal, Section 409 of the Act of 1915, already quoted, provides that from any decision of the board 'on a question of law' an appeal may be taken 'to the courts.' The first specific mention of either the Supreme or Superior Court occurs at the end of section 425, as follows: 'Any appeal from a decision of

the board to the Courts of Common Pleas, and from them to the Supreme or Superior Court, shall take precedence over all other civil cases.' The next and only other reference to the latter courts appears in Section 433 (P. L. 756), to the effect that it shall be the duty of their prothonotary 'to make a monthly report to the board of the disposition of all appeals taken to such courts,' in workmen's compensation cases. Thus it becomes apparent there is no actual provision contained in the Act of 1915, *supra*, authorizing an appeal from the Common Pleas to either the Supreme or Superior Court; hence, our right of review is on *certiorari* alone * * * (Appendix C, page 58 of brief).

In reading this opinion, one must constantly keep in mind that the compensation board did not treat the appeal to it as on an allegation of mistake of fact, and grant a hearing *de novo*, but as involving and turning upon a question of law, *i. e.*, was there legal proof to sustain the conclusion of the referee? Under these circumstances, that body had no power to make separate findings of fact; hence the statutory rule that 'the board's findings of fact shall in all cases be final' (held to be binding upon the courts in Poluskiewicz *vs.* P. & R. C. & I. Co., 257 Pa. 305) does not apply. The findings referred to in section 409 of the act, as just quoted, mean either those made after a hearing *de novo* before the board or contained in the report of the referee and affirmed by the former. In the present case, had the board considered the appeal to it as involving questions of fact, granted a hearing *de novo* and made its own findings, restricting them to what is considered the ultimate, or controlling, facts involved, the court below would have been powerless to interfere, so far as the question now before us is concerned, unless the record had been returned for additional findings (Poluskiewicz *vs.* P. & R. C. & I. Co., *supra*); for, on *certiorari*, the testimony not being up for review, in the absence of findings as to the character of the evidence,

the courts would be obliged to assume the latter competent, relevant and sufficient * * *" (Appendix C, page 64 of brief).

It would therefore seem clear that this law as interpreted in these decisions confers power upon the Workmen's Compensation Board to make findings of fact which are final and conclusive. That it makes no provision for bringing the testimony before the Courts on appeal. That their right of review is upon *certiorari* alone and that they are powerless to interfere to determine the legal question whether there is a lack of evidence to support the findings of fact because the testimony is not and cannot be brought before them. If this is so we contend that the Workmen's Compensation Board of Pennsylvania is clothed with an arbitrary and unbridled discretion, inconsistent with a proper conception of due process of law.

The Supreme Court of Pennsylvania decided the McCauley case on May 6, 1918. It decided the case at bar on March 24, 1919, and a writ of error was allowed by this Court on May 10, 1919. The legislature then sitting, thereupon passed an amendment to the Workmen's Compensation Act of 1915, Act of June 26, 1919, Laws of Pennsylvania page 642. The pertinent portions of this amendment are set forth in Appendix D with the new matter in italics.

Section 409 of the old Act which provided that the Board's findings of fact should be final was rewritten as Section 418 of the new Act and a proviso added, that the findings of fact should be final *except as hereinafter provided* (Appendix D, page 66, underlined).

Section 428 of the old Act appears as Section 422 amended to read "*but all findings of fact shall only be based upon competent evidence*" (Appendix D, page 66, underlined).

Section 425 of the old Act is amended in Section 427 to provide for a right of appeal the appellant to specify *"the findings of fact if any which he alleges to be unsupported by competent evidence."* The Board to *"certify to such Court its entire record in the matter in which the appeal has been taken, including the notes of testimony."* Further an appeal is allowed to the Supreme or Superior Court *"and the record so certified shall contain all that was before the Court of Common Pleas"* (Appendix D, pages 68, 69, underlined).

It would seem then that the Legislature of Pennsylvania was impressed by the contention of the plaintiff in error in this case and by the allowance by this court of the writ of error and either deemed the Act of 1915 as interpreted unconstitutional in this particular or considered that the Supreme Court of the State had misinterpreted the legislative intent.

(b) *The judgment of the Supreme Court of Pennsylvania is wrong if, with power to examine the evidence before the Workmen's Compensation Board, in passing upon the appeal pending before it, it refuses to exercise its power, which, if exercised, would have disclosed to that Court the absence of any evidence upon the record before the Compensation Board to sustain the award which was affirmed by the Court below.*

THE SUPREME COURT OF PENNSYLVANIA ERRED IN REFUSING TO EXAMINE OR REVIEW THE EVIDENCE FOR THE PURPOSE OF DETERMINING WHETHER OR NO THE PLAINTIFF-IN-ERROR WAS DENIED A FEDERAL RIGHT BY THE JUDGMENT OF THE COURT OF COMMON PLEAS WHICH WAS BASED UPON FINDINGS OF FACT UNSUPPORTED BY ANY EVIDENCE (Third Specification).

It would seem under the decisions of this Court that the Supreme Court of Pennsylvania had the power to examine the evidence before the Workmen's Compensation Board in passing upon the appeal pending before it.

In **Bradley vs. Richmond,** 227 U. S. 477, at page 483, Mr. Justice Lurton, speaking for the Court, said:—

> "If the right to appear and be heard and to obtain a review should prove illusory, there would, under general principles of jurisprudence, remain the right to judicial review, if the result should violate either a right secured under the law of the State or that of the United States. This is the right which plaintiff in error has in this very case asserted. Kentucky Railroad Tax Cases, 115 U. S. 321, 335, 336."

In **Plymouth Coal Company vs. Pennsylvania,** 232 U. S. 531, at page 545, this Court, speaking through Mr. Justice Pitney, said:—

> "It is to be presumed, until the contrary appears, that the administrative body would have acted with reasonable regard to the property rights of plaintiff in error; and certainly if there had been any arbitrary exercise of its powers its determination would have been subject to judicial review. Liebermann *vs.* Van De Carr, 199 U. S. 552, 562; Bradley *vs.* Richmond, 227 U. S. 477, 483."

And at page 547:—

> "It is further objected that the statute provides for no appeal from the determination of the tribunal. But in such cases the right of appeal on other than constitutional grounds may be conferred or withheld, at the discretion of the Legislature. As already pointed out, an appeal on fundamental grounds in this instance seems to inhere in the very practice prescribed by the statute for the enforcement of the determination of this statutory tribunal. Were this not expressed in the Act, it would none the less be implied, at least so far as pertains to any violation of rights guaranteed by the Fourteenth Amendment. Yick Wo *vs.* Hopkins,

118 U. S. 356, 370; Liberman *vs.* Van De Carr, 199 U. S. 552, 562."

And in **Hawkins vs. Bleakly,** 243 U. S. 210, this Court, at page 215, cited with approval this language of the Supreme Court of Iowa:—

> "Appeal is provided from the decree enforcing the award on which all save pure questions of fact may be reviewed. * * * We hold that though the Act does not in terms provide for judicial review, except by said appeal, the statute does not take from the court all jurisdiction in the premises. * * * We are in no doubt that the very structure of the law of the land, and the inherent power of the courts, would enable them to interfere, if what we have defined to be the jurisdiction conferred upon the arbitration committee were by it exceeded—could inquire whether the act was being enforced against one who had rejected it, whether the claiming employe was an employe, whether he was injured at all, whether his injury was one arising out of such employment, whether it was due to intoxication of the servant, or self-inflicted or, acceptance being conceded, into whether an award different from the statute schedules had been made, into whether the award were tainted with fraud on part of the prevailing party, or of the arbitration committee, and into whether that body attempted judicial functions, in violation of or not granted by the Act." Thus it will be seen that the Act prescribes the measure of compensation and the circumstances under which it is to be made, and establishes administrative machinery for applying the statutory measure to the facts of each particular case; provides for a hearing before an administrative tribunal, and for judicial review upon all fundamental and jurisdictional questions. This disposes of the contention that the administrative body is clothed with an arbitrary and unbridled discretion, inconsistent with a proper conception of due process

of law. Plymouth Coal Company *vs.* Pennsylvania, 232 U. S. 531, 545.

And again upon this question in **Coppage vs. Kansas,** 236 U. S. 1, in the opinion of Mr. Justice Pitney, as follows:—

> "But, when a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purpose, but rather upon its operation and effect as applied and enforced by the State; and upon these matters this court cannot, in the proper performance of its duty, yield its judgment to that of the state court. St. Louis S. W. Ry. *vs.* Arkansas, 235 U. S. 350, 362, and cases cited."

THIRD QUESTION.

3. Whether the judgment of the Supreme Court of Pennsylvania should be reversed because it affirms the judgment of the Court below sustaining the award of the Workmen's Compensation Board in favor of the claimant, in spite of the record evidence that the claimant's decedent was engaged in interstate commerce at the time of the accident which caused his death.

The evidence upon this record shows conclusively that the employment of the decedent at the time of his injury was interstate in character. This evidence is set forth in the brief filed by plaintiff in error in support of the Writ of *Certiorari*, but for convenient reference is again excerpted here.

Testimony of **Constantine** (Record, page 12):—

> "Q. When you received your tickets for this train at Locust Gap Colliery, was there more than one form or character of ticket given you?

"A. Two characters of ticket.

"Q. Without regard to any inscription or writing on it, but solely as to form, were you given any tickets of that character(indicating)?

"A. Yes, something similar to that, about similar to that.

"Q. And where were the cars covered by that form of ticket ——

"MR. PARRY:—Have you not subpoenaed these records?

"MR. REICK:—Yes, but I have not subpoenaed them from this witness, because he does not have them in his possession. The testimony was that he parted with them.

"MR. PARRY:—Cannot he identify the ones he had?

"MR. REICK:—We do not have the originals. They are exclusively within your control.

"MR. PARRY:—You subpoenaed them. We have them here.

"Q. You say you had two forms of ticket?

"A. Yes, sir.

"Q. The one form, known as form 1285, was for cars consigned to St. Clair Scale?

"A. St. Clair Scale.

"Q. And the other, known as form 1262, consigned to Shamokin Scale?

"A. Yes, sir.

"Q. When you surrendered your train as you have indicated, by shifting some cars on one track and some on another at Locust Summit, what did you do with the tickets?

"A. Gave them to the yardmaster."

These tickets are set forth as Exhibits in the Record between pages 72 and 74 inclusive. Certain of these cars had been for tickets marked MC, which the witnesses interpreted to mean cars for points on the New York Central Railroad outside of the State of Pennsylvania.

(Record, pages 21 and 22):—

"By MR. PARRY:

"Q. These orders that have 'MC' on them did not cover Shamokin coal, did they?

"A. No, sir.

"Q. That coal was going beyond Shamokin, was it not?

"A. That is what I said; it meant a car to be applied on the N. Y. C. road, or an N. Y. C. & H. car. That is as far as my knowledge goes, when you get a call for that as a yardmaster we apply an N. Y. C. & H. car on that coal.

"Q. That is to get the New York Central cars back on their own road, I suppose?

"A. Yes, sir.

"Q. And they go up over the road to Newberry Junction and then to the New York Central; that is right?

"A. Yes, sir.

"By MR. REICK:

"Q. The understanding that you have of the initials 'MC' and these other initials that have been referred to, they are part of a code or instructions given to you by your company for the purpose of ——

"MR. PARRY:—Ask him to explain it.

"Q. Explain what 'MC' is and how you get it and what the effect of it is, and what it means.

"A. As a yardmaster you get a code from Mahanoy Plane scale in the evening, calling for the cars for the collieries for the next day, the kind of cars to be furnished. 'MC' means that an N. Y. C.—they may call for twenty, 'MC' call. That means to furnish them with twenty N. Y. C. & H. cars. They may say five 'GK,' that means five Pennsylvania cars; and they may say five 'MC's'; that means we must furnish them with an N. Y. C. car or car suitable to load to Buffalo dock. That is what I mean by saying that 'MC' means to furnish a N. Y. C. & H. car, if possible, to furnish

ten or twenty, whatever it means, at the colliery that day, for loading to the N. Y. C. & H. road."

Testimony of **Quirk** (Record, page 25):—

"Q. What do the initials 'MC' stand for?

"A. Out of State points on the New York Central; out of Pennsylvania, State of New York.

"Q. Where did you get that 'MC' that you put on there?

"A. From the shipping agent at Mahanoy Plane scales.

"Q. I suppose you use that code very many times daily, do you not?

"A. Positively.

"Q. How long has that been the code letter for the New York Central points, New York State?

"A. I have been in the employ 14 years, and it has been for the last 14 years."

(Record, page 26):—

"Q. What does 'MC' mean?

"A. I think I answered that.

"Q. Answer it again.

"A. Points in New York State.

"Q. You did not say that a moment ago; you said points on the New York Central.

"A. No.

"MR. MACKEY:—No, he said points outside of the State, and New York State.

"Q. If a car was intended for shipment to a point on the New York Central Railroad in Pennsylvania, how would it be marked?

"A. I do not know as the Pennsylvania Railroad enters into the New York Central.

"Q. I did not say that. Listen to the question again. If a car left Locust Gap Colliery intended for a point on the New York Central Railroad within the

State of Pennsylvania, by what letters in your code would it be marked?

"A. Within the State of Pennsylvania?

"Q. Yes, sir, on the New York Central Railroad.

"A. I never had a shipment of that kind; I could not tell you.

"MR. PARRY:—The New York Central does not run into Pennsylvania; it is the Fall Brook and Beech Creek.

"Q. Did you ever have a shipment for points on the New York Central in Pennsylvania?

"A. No, sir; not that I can recall.

"Q. And you are unable to tell us just how a car intended for shipment to a point on the New York Central Railroad within the State of Pennsylvania would be marked?"

(Record, page 27):—

"A. Any New York Central orders are marked 'MC'.

"Q. Would that apply if it were to a point within the State of Pennsylvania?

"A. That is what I would like a little information on. Does the New York Central Railroad enter the State of Pennsylvania?

"Q. The question is, from your code, whether 'MC' applies to the New York Central as a railroad, or whether it applies within or without the State. That is the question, and your attention is directed to that.

"A. Out of the State?

"Q. Out of the State.

"A. Yes, sir.

"Q. And you cannot tell us how a car intended for shipment on the New York Central within Pennsylvania would be marked, can you?

"A. I never had any shipment.

"By MR. PARRY:

"Q. The New York Central's line in Pennsylvania

is called the Beech Creek Railroad, is it not? That is the railroad that connects with the Reading at Newberry Junction, is it not?

"MR. REICK:—The Fall Brook and Beech Creek, known as the New York Central, running right through to Clearfield.

"Q. Have you a code word for the Beech Creek?

"A. That 'MA' order is Beech Creek.

"Q. 'MA' is the Beech Creek code word?

"A. Yes, sir.

"Q. When the cars left your office or your colliery, you had no knowledge where those cars were going, beyond Shamokin Scales or St. Clair scales, did you?"

(Record, page 28):—

"A. I know those cars were going out of the State.

"Q. How?

"A. On that 'MC' order.

"Q. By reason of this code that is intended for the employees of the railroad and the Coal and Iron Company?

"A. Yes, sir.

"Q. And that is the only way, is that right?

"A. That I could not tell, either.

"Q. That is the only way you had of knowing?

"A. Yes.

"By MR. MACKEY:

"Q. Would it be necessary for you to know anything about the destination of a car of coal leaving your colliery?

"A. I am not supposed to know. I simply ship it to the scales, and it is re-billed at the scales.

"Q. Your order is, ship so many cars of coal to the scales?

"A. Yes, sir.

"Q. Do you put these tags on with various letterings when they leave your colliery—'MC' and 'MA'?

"A. Yes, sir.

"Q. Why do you do that? Why are you required to do that? Why don't you just send a certain number of cars up to the scales and let the re-billing occur there?

"A. It has been customary ever since I have been on the job, and so it is with all shippers. It may help the scale men out when they get these tickets; they know what line to ship over. We do not bill; we just ship to the scales, and the cars are weighed and re-ticketed and re-billed from there.

"Q. This is done for the purpose of secrecy as against competition, is it not?

"A. Not that I know of.

"MR. PARRY:—I do not think so.

"A. Those here are posted up at the office, that 'MC', and the different railroads. If I had my list here I could explain better.

"Q. When you send these trains out, then you know and you mark certain of them for points outside of the State?

"A. Yes, sir.

"Q. You know that there is going to be practically a continuous journey of that car from your colliery to a point without the State?

"A. Yes, sir.

"Q. And the only interruption of that journey is to weigh them at the scales?

"A. Yes, sir."

The evidence further shows that the rate of freight for the coal carried in these particular cars included transportation from the mine to the point of destination in the State of New York.

Testimony of STEWART (Record, page 32):—

"Q. I see here way bill No. 979, covering car New York Central 79749 from Shamokin scale to Rochester, New York; rate $1.90 per ton. That is correct, is it?

"A. Yes, sir.

"Q. Does that charge cover the haul from the colliery to Rochester, New York, or the haul from Shamokin scales to Rochester, New York?

"A. To the best of my knowledge that covers it from the colliery right through to the destination.

"Q. Do you charge any separate or additional sum for hauling the car from Locust Gap Colliery to Shamokin scale, other than that figure, at that rate?

"A. No, sir; not any."

There are certain findings of fact by the Compensation Board which show on their face that this employment was of the character contended for.

"The shipping orders that reached the hands of the conductor of the train upon which the deceased was working contained no suggestion of a shipment beyond the State of Pennsylvania in direct words, but there were certain cars of coal in this train that had been ordered in the usual method as above described but upon the cards or memoranda that reached the conductor there were certain letters of a private code, indicating that a car to which the card was attached was intended eventually to be shipped outside of the State.

"The part played by these letters in the final disposition of car Number 730455 is shown by the testimony. These letters 'MC' were placed upon this ticket in consequence of the orders telegraphed from Mahanoy Plane to the shipping clerk of the coal company at the mines and indicated that it was the intention of the shipper to eventually consign this particular car to a point without the State. This car was cut out of the train at Locust Summit and placed upon a switch in the yard where cars were assembled to be forwarded to Shamokin Scales.

"It must be remembered that this shipment was from the Philadelphia and Reading Coal and Iron Company to itself. When the car reached its destination at the Shamokin Scales it was inspected, weighed and re-

billed on the next day. Under the testimony there was no writing on the ticket below the double line. On the day after the deceased had been killed this car was billed to Ebner & Wahling, Webster, N. Y., via New York Central Railroad."

The conclusion of law reached by the Compensation Board conflicts with the evidence upon the record, with the findings of the Board above referred to, and with the decisions of this Court.

The cases which control and show how greatly in error the State Supreme Court was, when it affirmed the decision below, follow:

Baer vs. D. & R. G. R. R., 233 U. S. 479.

A shipper consigned a commodity from St. Louis, Mo., to Leadville, Col. It was transported over one railroad from St. Louis to Pueblo, Col., the receiving carrier giving a receipt showing that the commodity was to be delivered to the consignee at Leadville via another road. No through rate was established or no through bill of lading issued. The first company issued a bill of lading for the shipment from St. Louis to Pueblo at a local rate. The car was there delivered to another railroad company at a local rate, which company named to the consignee, the first railroad company as consignor. It was held by the United States Supreme Court that while there was no through rate or through route, there was in fact a through shipment from St. Louis, Mo., to Leadville, Col., and the interstate character of the shipment could not be destroyed by ignoring the point of origin and destination, separating the rate into component parts and by charging local rates and issuing local way-bills and thus attempting to convert an interstate shipment into an intrastate shipment.

R. R. Commission vs. Texas & P. R. Co., 229 U. S. 336.

The shippers delivered to the carrier at certain stations in Louisiana 18 carloads of logs and stoves to be transported to Alexandria, Louisiana, and there delivered to another railroad which transported them to New Orleans, La., where they were unloaded from the cars, put on board ships and exported to foreign countries. The bill of lading in each case provided for the delivery of the freight from the initial point to New Orleans, there to be delivered to the shippers' or consignees' order. The consignee, a brother, resided at New Orleans. Notwithstanding the bills of lading the stoves and logs were intended by the shippers for export. The sole question before the United States Supreme Court was whether the shipments were foreign or intrastate commerce while moving in Louisiana. The Court held they were foreign shipments and that the cargo took that character when it actually started from the initial point of its journey, although it was transported within the State under local bills of lading to New Orleans. The stoves and logs were intended by the shippers to be exported to foreign countries and though the transportation was interrupted at New Orleans it was only to the extent necessary for transshipment.

Ohio R. R. Commission vs. Worthington, 225 U. S. 101.

Coal is shipped by mine operators in Ohio to Huron, Ohio, a port on Lake Erie, marked simply "Lake coal" consigned to the mine operator or some office employee whose name is merely used for convenience. The operator then notifies the railroad that at a certain time a vessel will be at Huron to load so many tons of a certain grade of coal. The railroad company then picks up such cars of the operator's coal in the yard at Huron as are necessary to fill the cargo, and moves them alongside the vessel, loads it and furnishes the shipper with a statement showing the car numbers and

weights and total tons of coal in the vessel, on which information the bill of lading is made out. There is testimony to the effect that when the coal leaves the mines it is not known in what vessel it will be loaded nor to what ultimate destination it will go, and sometimes such coal is sold and vessel arranged for after the coal is at Huron. Some of this coal is sometimes diverted for local consumption at the port.

On this statement of facts the Supreme Court of the United States held: "By every fair test the transportation of this coal from the mine to Huron is an interstate carriage intended by the parties to be such." * * * "Much stress is laid in the argument for the commission that the coal is billed only to Huron and in that aspect of the case it is controlled by G. C. & S. F. *vs.* Texas, 204 U. S. 403 * * * but there a new and independent contract for intrastate shipment was made, the interstate transportation having been completely performed; here a rate is fixed which includes the placing of coal in the vessels." * * *" The test of through billing is not determinative.

Held that the commission's order fixing an intrastate rate on this traffic be enjoined as a direct attempt to regulate interstate commerce.

T. & N. O. R. Co. vs. Sabine Tram Co., 227 U. S. 111.

Lumber was shipped under local bills of lading from an interior point in Texas to a port in Texas where it was switched to the docks. The consignee presented the bills of lading, tendered the freight charges and demanded and received the lumber which he thereupon loaded on ships and sent to Europe. None of the lumber remained in the dock or in the slips longer than the time necessary to await the arrival of the ship chartered. Some of the lumber arrived before the ship was chartered and some afterwards. The shipments having the character of interstate commerce after they

passed out of the port, the question was when they acquired it. Citing Coe *vs.* Errol, and Commission *vs.* Worthington, *supra*, the Supreme Court of the United States held that since the lumber was intended for export it was of no consequence that the original shipper had no concern with it after it reached the port. The shipment was not an isolated one, but typical of many others, and that it is the nature of the traffic and not its accidents which determines its character. That there must be continuity of movement we may conceive and to a foreign destination at the time of shipment. The determining circumstance is that the shipment of lumber to the port was but a step in its transportation to its real and ultimate destination in foreign countries. The conclusion is that the interstate movement began, not at the port, but at the point of origin and interstate rates must be applied between these points to the exclusion of rates established by the State Railroad Commission.

It is scarcely possible to conceive of cases more exactly in point. Their application is so obvious that we will not extend this division of the brief by discussion.

We submit then that here there is a final judgment in a suit in the highest court in the State in which a decision in the suit could be had, where is drawn in question the validity of a Statute of the State and an authority exercised under the State on the ground of their being repugnant to the Constitution of the United States and the decision is in favor of their validity. This decision may be re-examined and reversed or affirmed by the Supreme Court of the United States upon a writ of error.

Act of Congress, Sept. 6, 1916, 39 Stat. 728, Chapter 448, Sect. 237. Amendment to Judicial Code.

All of which is respectfully submitted.

GEORGE GOWEN PARRY,
Counsel for plaintiff-in-error.

APPENDIX A.

The Act of Assembly of the State of Pennsylvania of June 2, 1915, Pamphlet Laws, page 736, known as the Workmen's Compensation Act, provides, *inter alia*:—

Article IV.

Procedure.

Section 401. The term "Referee" when used in this article shall mean Workmen's Compensation Referee.

The term "Fund" when used in this article shall mean the State Insurance Fund of this Commonwealth.

The term "employer" when used in this article shall mean the employer as defined in Article one of this act, or his duly authorized agent, or his insurer if such insurer has assumed the employer's liability, or the fund if the employer be insured therein.

Section 402. All proceedings before the Board or any referee, and all appeals to the Board, shall be instituted by petition addressed to the Board. All petitions shall be in writing and in the form prescribed by the Board.

Section 403. All petitions, all copies of agreements for compensation, and all other papers requiring action by the Board, shall be mailed or delivered to the Bureau at its principal office.

Section 404. The Bureau shall, immediately upon their receipt, properly file and docket all petitions, agreements for compensation, findings of fact by the Board or any referee, awards or disallowances of compensation, or modifications thereof, and all other reports or papers filed with it under the provisions of this act or the rules and regulations of the Board.

Section 405. The Bureau shall, by mail or in such other manner as the Board shall direct, transmit to the Board or the proper referee true copies of all petitions, agreements, or other papers requiring action by the Board or a referee.

Section 406. At the close of each day the Board and all referees shall, in such manner as the rules of the Board shall prescribe, transmit to the Bureau all findings of fact,

awards or disallowances of compensation, or modifications thereof, or other decisions or reports rendered during the day.

Section 407. Immediately upon receiving from the Board or any referee any approval or disapproval of any agreement for, or any award or disallowance of, compensation, or any modification thereof, or any other decision, the Bureau shall serve a certified copy thereof on all parties in interest.

Section 408. All notices and certified copies to which any party shall be entitled under the provisions of this article shall be served by mail, or in such other manner as the Board shall direct. For the purposes of this article any notice or certified copy shall be deemed served on the date when mailed, properly stamped and addressed, and shall be presumed to have reached the party to be served; but any party may show by competent evidence that any notice or certified copy was not received, or that there was unusual or unreasonable delay in its transmission through the mails. In any such case proper allowance shall be made for the party's failure within the prescribed time to assert any right given him by this act.

The Bureau, the Board, and every referee shall keep a careful record of the date of mailing every notice and certified copy required by this act to be served on the parties in interest.

Section 409. A referee's findings of fact shall be final, unless the Board shall allow an appeal therefrom as hereinafter provided. The Board's findings of fact shall in all cases be final.

From the referee's decision on any question of law an appeal may be taken to the Board, and from any decision of the Board on a question of law an appeal may be taken to the courts as hereinafter provided.

Section 410. On or after the fourteenth day after any accident shall have occurred, the employer and the employe or his dependent may agree upon the compensation payable to the employe or his dependent under this act; but any agreement made prior to the fourteenth day after the acci-

dent shall have occurred, or permitting a commutation of payments contrary to the provisions of this act, or varying the amount to be paid or the period during which compensation shall be payable as provided in this act, shall be wholly null and void.

All agreements made in accordance with the provisions of this section shall be in writing, and signed by all parties in interest.

Section 411. Whenever an agreement shall be executed between an employer and an employe or his dependent as provided by this act, a certified copy of the same signed by all parties in interest shall be mailed or delivered to the Board. It shall be the duty of the Board to examine the agreement, and to determine whether it conforms to the provisions of section four hundred and ten, and, within thirty days after the copy of the agreement has been mailed or delivered to it, to notify the parties thereto of its validity or invalidity under the aforesaid section: Provided, however, That any payment made in accordance with any agreement prior to the receipt of notice of invalidity shall discharge pro tanto the liability, under article three of this act, of the employer making such payments.

Section 412. If, after any accident, the employer and the employe or his dependent, concerned in any accident, shall fail to agree upon the facts thereof and the compensation due under this act, the employe or his dependent may present a claim for compensation to the Board.

Section 413. Whenever a claim-petition shall be presented to the Board, the Bureau shall promptly assign it to a referee for hearing and determination. The Bureau shall forthwith notify such referee that the petition has been assigned to him, and shall serve upon each adverse party in interest a certified copy of the petition, and a notice that, unless an answer shall within seven days be filed with the referee to whom the petition has been assigned (giving his name and address), the allegations of the petition shall be deemed admitted.

Section 414. Within seven days after a certified copy of the petition and a notice as herein required shall have

been served upon any adverse party, he may file with the referee designated in the notice an answer in the form prescribed by the rules and regulations of the Board.

Section 415. Seven days after notice of a claim-petition shall have been served upon the adverse parties thereto, the referee shall fix a time and place for hearing the claim, and shall notify all the parties in interest. The time of hearing shall be not less than twelve days nor more than twenty-one days after notice of the filing of the petition shall have been mailed or delivered to all adverse parties thereto. Together with the notice of the time and place of hearing, a copy of any answer filed by any adverse party shall be mailed or delivered to the petitioner or petitioners.

Whenever all adverse parties in interest have concurred in the answer, all facts not denied therein shall be deemed admitted, and no testimony shall be required from the petitioner or petitioners, or heard on behalf of the adverse parties, upon any fact not controverted in such answer.

Section 416. The referee designated by the Bureau, or such other referee as the Board shall substitute for him, shall hear evidence relating to the claim at the time and place stated in the notice to the parties.

Section 417. The referee, if he shall deem it necessary, shall, either before or after any hearing, make an investigation of the facts set forth in the petition, or cause the same to be made. With the consent of the Board he may appoint one or more impartial physicians or surgeons to examine the injuries of the plaintiff and report thereon, or he may employ the services of such other experts as shall appear necessary to ascertain the facts. The Board shall fix the compensation of such physicians, surgeons, and experts, and the referee shall tax the same as a part of the cost of the proceedings, to be paid by either party, or both, as the Board may direct. The report of any physician, surgeon, or expert appointed by the referee shall be filed with him, and shall be a part of the record and open to inspection by any party to the same.

Section 418. Within seven days after the conclusion of any hearing the referee shall, in writing, state his findings

of fact, his award or disallowance of compensation in accordance with the provisions of this act, and such other matters as the rules of the Board shall require.

Section 419. Any party in interest may, within ten days after notice of a referee's award or disallowance of compensation shall have been served on him, take an appeal to the Board on the ground: (1) That the award or disallowance of compensation is not in conformity with the terms of this act, or that the referee committed any other error of law; or (2) that the findings of fact and award or disallowance of compensation was unwarranted by the evidence; or because of fraud, coercion, or other improper conduct by any party in interest.

Section 420. Whenever an appeal shall be based upon an alleged error of law, it shall be the duty of the Board to grant a hearing thereon. The Board shall fix a time and place for such hearing, and shall serve notice thereof on all parties in interest.

As soon as maybe after any such hearing, the Board shall either sustain or reverse the referee's award or disallowance of compensation, or make such modification thereof as it shall deem proper.

Section 421. Whenever an appeal shall be taken on the ground that the referee's award of disallowance of compensation was unwarranted by the evidence, or because of fraud, coercion, or other improper conduct by any party in interest, the Board may, in its discretion, grant a hearing de novo or sustain the referee's award or disallowance of compensation. If the Board shall grant a hearing de novo, it shall fix a time and place for the same and shall notify all parties in interest.

The Board shall at all times have the power to make any investigation which it shall deem necessary to ascertain the facts. It may employ physicians, surgeons, or other experts to aid in its investigation; and shall in all cases fix the compensation of such physicians, surgeons, or experts, and tax the same as a part of the costs of the proceedings, to be paid by either party, or both, as the Board may direct.

As soon as may be after any hearing de novo by the Board, it shall in writing state its findings of fact, and award or disallow compensation in accordance with the provisions of this act.

Section 422. Whenever the employer and the employe or his dependent shall, on or after the fourteenth day after any accident, agree on the facts on which a claim for compensation depends, but shall fail to agree on the compensation payable thereunder, they may by petition request the Board to determine the compensation payable. Such petition shall contain the agreed facts and shall be signed by all parties in interest. The Board shall fix a time and place for hearing the petition, and shall notify all parties in interest. As soon as may be after such hearing, the Board shall award or disallow compensation in accordance with the provisions of this act.

Section 423. All agreements for compensation shall be subject to review by the Board at any time, upon presentation of a petition alleging fraud, mistake, coercion, or other proper cause. The Board shall fix a time and place for hearing the petition, and shall notify all parties in interest.

As soon as may be after such hearing, the Board shall either ratify or disapprove the agreement

Section 424. If any party shall desire the commutation of future instalments of compensation, he shall present a petition therefor to the Board. The Board shall appoint a time and place for hearing the petition, and shall notify all parties in interest.

Every such petition shall be heard by the Board, but the Board may refer any question of fact arising out of such petition to a referee, whose findings shall be final, unless upon petition the Board shall, for cause shown, grant a hearing on the facts.

The Board shall fix a time and place for the hearing, and shall notify all parties in interest.

Section 425. If any party in interest shall desire to appeal from the decision of the Board on matters of law, he shall, within ten days after notice of its decision shall have been served on him, file a notice of appeal with the prothonotary of the court of common pleas of the county in which

the accident occurred, or of the county in which the adverse party resides or has a permanent place of business, or, by agreement of the parties, to the court of common pleas of any other county. In such case it shall be the duty of the Bureau, within ten days, to prepare and mail or deliver to the prothonotary of the proper county a transcript of the agreement or finding of fact and award or disallowance of compensation, or modification thereof, involved in the appeal.

Any appeal from a decision of the Board to the courts of common pleas, and from them to the Supreme or Superior Court, shall take precedence over all other civil cases.

Section 426. Any agreement or award of compensation may be modified or terminated at any time by a subsequent agreement approved by the Board, and may be modified or terminated by the Board or a referee designated by the Board, on the petition of either party, on the ground that the incapacity of the injured employe has subsequently increased, decreased, or terminated, or that the status of any dependent has changed. In such case the procedure shall be the same as that provided in the case of an original agreement or petition.

Section 427. All hearings before the Board or before a referee shall be public.

Section 428. Neither the Board nor any referee shall be bound by the technical rules of evidence in conducting any hearing or investigation.

Section 429. Wherever, after an accident, any employe or his dependents shall have entered into a compensation agreement with his employer, or shall file a claim-petition with the Board, he may file a certified copy thereof with the prothonotary of the court of common pleas of any county. The prothonotary shall enter the amount stipulated in any such agreement or claimed in any such petition as a judgment against the employer. If the agreement be approved by the Board, or compensation awarded as claimed in the petition, the amount of compensation stipulated in the agreement or claimed in the petition shall be a lien, as of the date when the agreement or petition was

filed with the prothonotary. Pending the approval of the agreement or the award of compensation, no other lien which may be attached to the employer's property during such time shall gain priority over the lien of such agreement or award; but no execution shall issue on any compensation judgment before the approval of the agreement or the award of compensation on the said petition.

If the agreement be disapproved, or, after hearing, compensation shall be disallowed, the employer may file with the prothonotary of any county in which the petition or agreement is on record as a judgment, a certified copy of the disapproval of the agreement or disallowance of compensation, and it shall be the duty of such prothonotary to strike off the judgment.

If the amount of compensation claimed be disallowed, but another amount awarded, the compensation judgment shall be a lien to the extent of the award, as of the date of filing the petition with the prothonotary, with the same effect as to other liens and the same disability to issue execution thereon as if the compensation claimed had been allowed. In such cases the prothonotary shall make such modification of the record as shall be appropriate.

If, after approval of the agreement or award, the agreement or award be subsequently modified, either party may file with the prothonotary a certified copy of the modified award or agreement, and it shall be the duty of the prothonotary to make such modification of the record as shall be appropriate, and the lien of the judgment shall be modified accordingly.

Section 430. If any party against whom a compensation agreement or award is on record in any county of this Commonwealth shall, at any time, present to the Board receipts or copies thereof, certified by any referee, showing the payment of compensation as required by the agreement or award in full, to the date of presentation to the referee, the Board shall issue a certificate to such party in the form prescribed, stating the extent to which the judgment of the agreement or award has been reduced. Upon presentation of such certificate to the prothonotary of any county in which the agreement or award is on record, it shall be the

prothonotary's duty to mark the judgment satisfied to the extent of the payments so certified.

Section 431. The lien of any judgment entered upon any award shall not be divested by any appeal. If, however, the party appealing from the award shall file with the Board a bond, in such amount and in such form as the rules and regulations of the Board shall direct, the appeal shall, pending its decision, excuse the payment of so much of the compensation as is contested therein; but if the final decision on appeal shall sustain the award, it shall be the duty of the employer by whom such award is payable to make payments of compensation as from the date of the original award. If on appeal the award is sustained as to a part, it shall be the duty of the employer by whom such part is payable to make payments as from the date of the original award. In case the award is annulled on appeal, it shall be the duty of the prothonotary of any county in which such award has been entered as a judgment to mark it satisfied.

Section 432. The cost of the prothonotary for entering the amount of compensation as provided in this act, or making a modification of the record, or marking the judgment satisfied, shall be allowed, taxed, and collected as upon a confession of judgment.

Section 433. It shall be the duty of the prothonotary of each court of common pleas, and of the Supreme and Superior Courts of the Commonwealth, to make a monthly report to the Board of the disposition of all appeals taken to such court under the provisions of this article.

Article V.

General Provisions.

Section 502. If any provision of this act shall be held by any court to be unconstitutional, such judgment shall not affect any other section or provision of this act, except that articles two and three are hereby declared to be inseparable and as one legislative thought; and if either article be declared by such court void or inoperative in an essential part, so that the whole of such article must fall, the other article shall fall with it and not stand alone.

APPENDIX B.

Decision of the Supreme Court of Pennsylvania reported in 257 Pa. 305.

SUPREME COURT OF PENNSYLVANIA.

Frances Poluskiewicz

vs.

The Philadelphia and Reading Coal and Iron Company.

January Term, 1916.

No. 372.

Per Curiam.

Section 409 of the Act of June 2, 1915, P. L. 736, is as follows: "A Referee's findings of fact shall be final, unless the Board shall allow an appeal therefrom as hereinafter provided. The Board's findings of fact shall in all cases be final. From the Referee's decision on any question of law an appeal may be taken to the Board, and from any decision of the Board on a question of law an appeal may be taken to the Courts as hereinafter provided." Referees and the Workmen's Compensation Board must realize the great responsibility imposed upon them by the provision that their findings of fact are final. If they err in this respect Courts can grant no relief to parties who may be wronged. In the light of the plain words of the statute, the learned Court below was of the correct opinion that it could not disturb the facts found by the Compensation Board.

Appeal dismissed at appellant's costs.

APPENDIX C.

Decision of the Supreme Court of Pennsylvania reported in 261 Pa. 312.

SUPREME COURT OF PENNSYLVANIA.

McCauley

vs.

Imperial Woolen Company.

January Term, 1917.

No. 336.

OPINION BY MR. JUSTICE MOSCHZISKER, May 6, 1918:

The plaintiff, widow of James McCauley, claimed compensation for the death of her husband; the referee found in favor of the claimant; the Workmen's Compensation Board reversed this finding; the case was removed to the Common Pleas of Philadelphia County, which reversed the board and affirmed the referee; the defendant employer entered the present appeal.

Several interesting points of law are thus raised, which we shall pass upon separately. The first of them may be divided into three branches, i. e., the jurisdiction on appeal of (a) the compensation board, (b) the common pleas, and (c) this court; they will be considered in the order stated.

The Act of June 2, 1915, P. L. 736, in Section 409 (P. L. 751), stipulates that "a referee's findings of fact shall be final, unless the board shall allow an appeal therefrom as hereinafter provided." Section 419 (P. L. 753) provides that any party in interest may appeal to the board on the grounds: (1) that the referee's decision is not "in conformity with the terms of this act, or that the referee committed any other error of law"; (2) that the findings of fact and conclusions of the referee are "unwarranted by the evidence," or "because of fraud, coercion or other improper conduct by any party in interest."

Section 420 (P. L. 753) provides that when an appeal is based on alleged error of law, the board may either sustain, reverse or modify the decision of the referee. Section 421 (P. L. 753) provides that when the appeal is taken on the ground that the referee's decision is unwarranted by the evidence, or because of improper conduct by a party in interest, the board may either sustain the referee or "grant a hearing de novo."

The referee is an officer of the board, vested with defined duties and powers; all records made by him belong to the files of that body, and, on appeal, are before it for review, within the limitations of the act. The statute contemplates and requires that, if, after inspection and consideration of the adjudication and evidence, the board does not sustain the referee's final decision, before the former may reverse on a question of fact, it must grant a hearing de novo, make investigation, and substitute its own findings of fact, and conclusions thereon, for such findings of the referee as are not adopted; but, when an appeal is based only on alleged error of law, the board must act solely upon the record of the referee and, thereon, it may either sustain, reverse or modify the latter's final order.

That learned jurist, President Judge Shafer, of the Common Pleas of Allegheny County, in Yalch *v.* Jones & Laughlin Steel Company, 65 P. L. J. 636, 637, correctly construes the Act of 1915, supra, thus: Appeals to the board "are taken under two sections of the act [420 and 421]; the first amounts to a writ of error, and the second to a motion for a new trial, the new trial to be had before the board instead of the referee. The first of them is to redress errors of law committed by the referee, and the second to review his findings of fact when it is claimed they are not warranted by the evidence. The finding of fact without any evidence at all is an error of law. While the appeal in this case is taken because it is alleged that the findings of fact are not supported by the evidence, this does not prevent the board from treating the appeal, as taken under section 420, rather than section 421."

In cases of the character of the present claim, the ultimate finding is often cast in the form of a mixed conclusion of fact and law; and, under such circumstances, if the classification of an appeal is not made plain by the appellant, ex necessitate the board must exercise its discretion in determining the nature thereof. Here, admittedly, the appeal was properly treated as turning on a point of law.

The real contention is an utter lack of legal evidence to sustain the referee's conclusion that the death of James McCauley was occasioned by an accident occurring in the course of his employment. In other words, the defendant employer does not controvert, as matter of fact, that McCauley's death was due to the cause set up by claimant, but denies there is any legal proof to show that this causal event, which is alleged as an accident, happened while deceased was engaged in the course of his employment. This contention raises a question of law, which the board had power to determine under section 420, upon a consideration of the legal adequacy of the testimony taken before the referee; had the attack been simply upon the ground that the testimony was insufficient in fact to justify the latter's findings, and not that there was no legal evidence whatever to warrant them, a question of fact, not of law, would have been raised; and, under section 421, the board would have been obliged either to sustain the referee or grant a new hearing.

On a hearing de novo under section 421, the depositions taken before the referee might, by agreement of the parties, be accepted by the board as proofs in the case, either for the purpose of finding its own facts or formally adopting those stated by the referee; but, on a hearing solely to determine a point of law, raised by appeal under section 420, the testimony has no place in the consideration for the purpose of finding new facts, because those found by the referee, being unappealed from, are final under section 409. In a case like the one at bar, however, the board must consider the legal sufficiency of the testimony, not to find new facts, but in order to deter-

mine whether or not those relied upon by the referee may stand in law. Of course, if the appeal raises both questions of fact and law, the board may treat it accordingly. In this instance, the board acted in conformity with the intent of the parties, and proper procedure, when it finally disposed of the point involved as one of law; the question of the correctness of its legal conclusion will be adjudged later in this opinion.

The next matter for our consideration concerns the rights and duties of the common pleas upon the appeal to that tribunal from the decision of the compensation board. Section 409 of the Act of 1915, supra, provides that "the board's findings of fact shall in all cases be final....., [but] from any decision of the board on a question of law an appeal may be taken to the courts as hereinafter provided." Section 425 (P. L. 754) provides that, if any party in interest desires to appeal from the decision of the board "on matters of law," he must file notice in the appropriate Court of Common Pleas, and, in such case, it shall be the duty of the Bureau of Workmen's Compensation to prepare and deliver to the prothonotary of the proper county "a transcript of the .....finding of fact and award or disallowance of compensation, or modification thereof, involved in the appeal."

As recently stated in Franklin Film Manlfacturing Corporation, 253 Pa. 422, 426, "at the present time, in our law, the word 'appeal' has no conclusive meaning .....; therefore it is necessary in each instance to look at the particular act of assembly giving the right of appeal, to determine just what powers are to be exercised by the appellate court."

The statute here in question makes no provision for bringing up the testimony to the courts by sealing a bill, certifying the record thereof, or other known method; more than this, the act particularly prescribes what shall be sent to the common pleas—significantly, in view of its provisions as to the finality of the findings of fact, omitting reference to the evidence taken before the referee

or board—all of which makes it clear that the appeal to the common pleas contemplated by this statute is in the nature of a certiorari, the purpose probably being to prevent appeals to the courts, except for errors of law, and thus to hasten the final determination of claims under the act.

It may be noted that, if the legislature had desired the testimony in workmen's compensation cases brought up on appeal, by the courts, for consideration, it knew how to accomplish this end, as shown by Article VI, Section 18, of the Public Service Company Law (Act of July 26, 1913, P. L. 1374, 1425), where it is provided that, on such appeals from the utilities commission, the testimony shall be certified, "under seal," as part of the record for consideration: see St. Clair Boro. v. Tamaqua & P. E. Ry. Co., 259 Pa. 462, 467.

On certiorari, judicial review is usually limited to a mere inspection of the record, to ascertain whether the judgment in question is in conformity therewith, or to see whether the tribunal which rendered such judgment either exceeded its jurisdiction or abused its discretion; and, generally speaking, the opinion of the lower tribunal is no part of the record. In statutory proceedings such as the one at bar, however, it is now firmly established with us that, even on certiorari, an appellate court may examine the opinion of the court below "to see the basis on which it acted": Franklin Film Mfg. Corp., supra, p. 426.

Here, fortunately for the claimant, the material underlying, or subordinate, findings of both the referee and board, as stated in their respective adjudications, are consistent with one another and show the exact character of proof upon which their divergent conclusions rest. Hence, albeit the common pleas properly could not examine the notes of testimony mistakenly included in the record sent to it (Carlson's License, 127 Pa. 330, 335; RICE, P. J., in Meenan's App., 11 Pa. Superior Ct. 579, 582), that tribunal was, and this court now is, in a position to determine the issue of the alleged lack of legal

evidence to sustain the referee's allowance of compensation; whether or not the conclusion of the court below in that regard was correct, we reserve for later consideration in this opinion.

As to the jurisdiction of the Supreme Court on the present appeal, Section 409 of the Act of 1915, already quoted, provides that from any decision of the board "on a question of law" an appeal may be taken "to the courts." The first specific mention of either the Supreme or Superior Court occurs at the end of section 425, as follows: "Any appeal from a decision of the board to the Courts of Common Pleas, and from them to the Supreme or Superior Court, shall take precedence over all other civil cases." The next and only other reference to the latter courts appears in Section 433 (P. L. 756), to the effect that it shall be the duty of their prothonotary "to make a monthly report to the board of the disposition of all appeals taken to such courts," in workmen's compensation cases. Thus it becomes apparent there is no actual provision contained in the Act of 1915, supra, authorizing an appeal from the Common Pleas to either the Supreme or Superior Court; hence, our right of review is on certiorari alone: Gangewere's App., 61 Pa. 342; Diamond St., 196 Pa. 254, 261.

The proceedings at bar being purely statutory, and differing from the common law, as already noted, on certiorari our jurisdiction is more analogous to that exercised upon the examination of equity proceedings than on the review of common law actions; and in the former class of cases the opinion of the chancellor may be looked at to discover the reasons for his action: Independence Party Nomination, 208 Pa. 108, 111; Foy's Election, 228 Pa. 14, 16 et seq.; Franklin Film Mfg. Corp., supra. Therefore, on the present review, this court may examine all that is properly contained (according to the provisions of the Act of 1915, supra) in the record sent to the common pleas, including the findings and reasons stated in the adjudications of the referee and board; and, of course, also including the reasons given by the court

below as the "basis" of its decision, but not the notes of testimony.

The foregoing considerations bring us to the controlling question in the case, i. e., whether the records referred to demonstrate either the presence or lack of legal evidence to sustain the findings of the referee to the effect that claimant's husband came to his death as the result of an accident which happened to him during the course of his employment.

James McCauley was a "wool sorter" in the employ of defendant; the latter admitted he died "of external, and not internal, anthrax." Concededly, it is a matter of general knowledge that anthrax is primarily a disease of animals, such as sheep, which may be transmitted to men when handling infected animal materials, like wool; it is caused by the entrance into the human body of anthrax bacilli, and their rapid multiplication and development. The findings of the referee show a practical accord among the doctors, produced as experts, that, in the majority of cases, the inoculation which causes external anthrax occurs through a scrtach or an abrasion of the skin; while internal anthrax is usually caused by inhaling the germ, or taking it in with food.

The findings further show that, when James McCauley went to his work on the morning of April 4, 1916, he was perfectly well and had no abrasion or mark upon his neck, but when he left defendant's plant, in the afternoon of that day, there was a "little scratch," or abrasion, "about the size of a dime," just above the "Adam's apple," which caused a swelling; and that this was the beginning of external anthrax, from which he died within three days.

The findings likewise show professional medical experts testified that, in their opinion, "if deceased was a wool sorter [as he was] when he went to work on April 4, 1916, with no marks on his neck, and sustained an abrasion about the size of a dime upon his neck, and the neck immediately began to swell, and external anthrax

developed, this condition probably was brought about by the anthrax germ entering through the abrasion."

In addition to the findings just referred to, others show that, on the afternoon of April 4th, as McCauley was leaving defendant's mill, he said to his son, "I got stuck with a sticker"; also that, immediately upon his arrival home, he told his wife that one of the stickers in the wool which he was carrying had torn him in the neck.

The board properly decided that what McCauley said, as to the cause of the mark upon his neck, is hearsay, and, standing alone, insufficient to sustain the findings in favor of the claimant made by the referee; but we concur in the view of the court below that the other facts in the case constitute circumstantial evidence which, together with the competent and relevant parts of the expert professional testimony already referred to, was adequate to sustain the referee's allowance of compensation. In other words, under the circumstances of this case, deceased apparently not having been where he was liable to become inoculated with external anthrax, except at his work, and he, as he left defendant's mill, on the day in question, having shown symptoms of that disease by the mark upon and swelling of his neck, the inference may reasonably be drawn, in view of the nature of the work on which he was engaged, that the inoculation occurred during the course of his employment; or, as said by one of the doctors, in all probability "the disease was caused by the anthrax germ entering through the skin by reason of a 'sticker' from the wool which deceased handled during the day."

In reaching the conclusion just stated, we have not examined the notes of testimony; which, as herein previously decided, were not properly before the court below and, therefore, are not part of the record on this appeal. For the purpose of determining the point involved, we have restricted our consideration to the reasons stated in the several adjudications before us, as the basis of the respective conclusions contained therein, and the material underlying findings of the referee and the board, which,

as previously stated, are consistent with each other and sufficiently indicate the character of evidence upon which the divergent ultimate, or controlling, findings rest. While findings of the latter class cannot be sustained on review when those of the former class show a fatal lack of legal evidence (which is not the case at bar), at the same time it is to be kept in mind that statutes of the character of the one now before us contemplate liberality in the admission of proofs and the inferences reasonably to be drawn therefrom; also that, even under the old law, the probable nature of an accident followed by death could be established by circumstantial evidence alone: Weinschenk v. Philadelphia H. M. Bread Co., 258 Pa. 98, 104.

On the subject of the proofs, section 428 (P. L. 755) of the Act of 1915, supra, provides that "neither the board nor any referee shall be bound by the technical rules of evidence in conducting any hearing or investigation." Section 417 (P. L. 752) provides that the referee, "either before or after any hearing" may "make an investigation of the facts set forth in the petition, or cause the same to be made," and that, with the consent of the board, he may appoint impartial experts to "ascertain the facts"; while section 421 states the board shall have power to make such investigations as it may deem necessary to ascertain the facts, and to "employ physicians, surgeons, or other experts, to aid in its investigation." Section 17 of the companion Act of June 2, 1915, P. L. 758 (760), also provides that "the board and every referee shall have the power to conduct any investigation which may be deemed necessary to ascertain the facts of any claim, or any other matter properly before such board or referee," and "such investigations may be made by the board or referee, personally,.....or by any other person or persons authorized by law."

These provisions do not mean, however, that either the referee or board has the right to find material facts on hearsay alone, whether such evidence is developed in the course of formal hearings or in less formal investiga-

tions; for, in the first place, the rule which forbids the making of material findings on hearsay alone, is more than a technical rule of evidence, and, next, there is nothing in the act before us which justifies the conclusion that the legislature intended any such loose method for determining material facts.

The act permits liberal investigation, by hearing and otherwise; but, after all the data has been gathered without regard to technical rules, then the proofs must be examined, and that which is not evidence within the meaning of the law, must be excluded from consideration; that is to say, when all the irrelevant and incompetent testimony has been put aside, the findings must rest upon such relevant and competent evidence of sound, probative character as may be left, be this either circumstantial or direct.

Here, the underlying findings show sufficient evidence of the kind just mentioned to sustain the ultimate, or controlling, findings made by the referee, to the effect that the scratch upon the neck of James McCauley occurred during the course of his employment and, at that time, the anthrax germ entered the body of deceased, subsequently causing his death. On these latter findings, the referee was justified in concluding that McCauley died as the result of an injury by accident while acting in the course of his employment, and, hence, that claimant was entitled to compensation.

Section 1, of the Act of 1915, supra, provides that the statute shall apply to "all accidents" occurring within this Commonwealth; this being limited by section 301 (P. L. 738) to cases where the employer and employee shall by agreement, "either express or implied," accept the provisions of the act. The section in question provides that, in such instances, "compensation for personal injury to, or for the death of, such employee, by an accident, in the course of his employment, shall be made." It then provides that "the terms 'injury' and 'personal injury'.....shall be construed to mean only violence to the physical structure of the body, and such disease or

infection as naturally results therefrom," and, wherever death is mentioned, "it shall mean only death resulting from such violence and its resultant effect": further, that "the term 'injury by an accident in the course of his employment'.....shall not include an injury caused by an act of a third person intended to injure the employee because of reasons personal to him and not directed against him as an employee or because of his employment, but shall include all other injuries sustained while the employee is actually engaged in the furtherance of the business or affairs of the employer." It is plain from these provisions that the act before us contemplates injuries by accident only, and, therefor, does not cover what are termed "occupational diseases."

It remains but to show that, in this case, the entry of the anthrax germ into the body of the deceased, and the disease or infection which naturally resulted therefrom, can be held properly to constitute an accident within the meaning of the act. In this connection, it is to be noted that there is nothing in the language quoted from section 301 which requires an injury to be caused through force externally applied, or, much less, by some tangible substance of material size. The words used are "violence to the physical structure of the body," not injury to the physical structure of the body by external violence. The violence in question may originate from lifting heavy weights, or from other provable cause (for instance, intense heat operating directly on the part of the body internally affected: see Lane v. Horn & Hardt Co., 261 Pa. 329,) which effect a sudden change in the physical structure or tissues of the body, and still be within the compensation act. In short, if the incident which gives rise to the injurious results complained of can be classed properly as a "mishap," or "fortuitous" happening—an "untoward event, which is not expected or designed"—it is an accident within the meaning of the workmen's compensation law: see House of Lords case of Fenton v. Thorley & Co., 19 T. L. R. 684, 685; Boardman v. Scott & Whitworth (1902), 1 K. B. 43, 46. When, however,

death results from germ infection, to bring a case of this character within the Act of 1915, supra, the disease in question must be a sudden development from some such abrupt violence to the physical structure of the body as already indicated, and not the mere result of gradual development from long continued exposure to natural dangers incident to the employment of the deceased person, as in cases of occupational diseases, the risks of which are voluntarily assumed.

Here, the anthrax germ, a distinguishable entity, came into actual contact with the deceased, thus gaining an entrance into his body, and his neck began to swell and discolor; therefore the complaint from which McCauley died can be traced to a certain time when there was a sudden or violent change in the condition of the physical structure of his body, just as though a serpent, concealed in the material upon which he was working, had unexpectedly and suddenly bitten him: see Hiers v. Hull & Co., 178 N. Y. (App. Div.) 350, 352.

In reading this opinion, one must constantly keep in mind that the compensation board did not treat the appeal to it as on an allegation of mistake of fact, and grant a hearing de novo, but as involving and turning upon a question of law, i. e., was there legal proof to sustain the conclusion of the referee? Under these circumstances, that body had no power to make separate findings of fact; hence the statutory rule that "the board's findings of fact shall in all cases be final" (held to be binding upon the courts in Poluskiewicz v. P. & R. C. & I. Co., 257 Pa. 305) does not apply. The findings referred to in section 409 of the act, as just quoted, mean either those made after a hearing de novo before the board or contained in the report of the referee and affirmed by the former. In the present case, had the board considered the appeal to it as involving questions of fact, granted a hearing de novo and made its own findings, restricting them to what it considered the ultimate, or controlling, facts involved, the court below would have been powerless to interfere, so far as the question now before us is

concerned, unless the record had been returned for additional findings (Poluskiewicz v. P. & R. C. & I. Co., supra); for, on certiorari, the testimony not being up for review, in the absence of findings as to the character of the evidence, the courts would be obliged to assume the latter competent, relevant and sufficient: Tool's App., 90 Pa. 376; DiNubiles's License, 11 Pa. Superior Ct. 571, 573; Meenan's License, 11 Pa. Superior Ct. 575, 578; Meenan's App., supra. Here, however, the written opinions of both the board and referee so plainly show, by findings, the character of the evidence, as to enable the courts to adjudge the legal question involved. Therefore the case is reduced to this: We having determined that there is no lack of legal proof to sustain the findings of the referee, and there having been no appeal from these findings as matters of fact, the provision in section 409 of the act, that "a referee's findings of fact shall be final unless the board shall allow an appeal therefrom," applies and governs in favor of the appellee.

The assignments of error are overruled, and the judgment of the court below is affirmed, with a procedendo.

APPENDIX D.

The Act of Assembly of the State of Pennsylvania of June 26, 1919, Pamphlet Laws, page 642, known as the Amended Workmen's Compensation Act, provides, *inter alia*:—

(New matter in italics.)

Section 418. *The board if a petition is directed to be heard by it, or the referee to whom a petition is assigned for hearing, may subpoena witnesses, order the production of books and other writings, and hear evidence and shall make, in writing and as soon as may be after the conclusion of the hearing, such findings of fact, conclusions of law, and award or disallowance of compensation or other order, as the petition and answers and the evidence produced before it or him and the provisions of this act shall, in its or his judgment, require. The findings of fact made by the board in any petition heard by it or upon a hearing de novo shall be final, except as hereinafter provided, and the findings of fact made by a referee to whom a petition has been assigned or any question of fact has been referred under the provisions of section four hundred and nineteen shall be final, unless the board shall, under the provisions of section four hundred and twenty-five of this article, grant a hearing de novo or a rehearing.*

(Revision of Section 409, Act of 1915.)

Section 422. Neither the board nor any referee shall be bound by the technical rules of evidence in conducting any hearing or investigation, *but all findings of fact shall be based only upon competent evidence.*

If any party or witness resides outside of the Commonwealth, or through illness or other cause is unable to testify before the board or a referee, his or her testimony or deposition may be taken, within or without this Commonwealth, in

such manner and in such form as the board may, by special order or general rule, prescribe. The records kept by a hospital shall be admissible as evidence of the medical and surgical matters stated therein, but shall not be conclusive proof of such matters.

(Amendment of Section 428, Act of 1915.)

Section 423. Any party in interest may, within ten days after notice of a referee's award or disallowance of compensation shall have been served on him, take an appeal to the board on the ground: (1) That the award or disallowance of compensation is not in conformity with the terms of this act, or that the referee committed any other error of law; (2) That the findings of fact and award or disallowance of compensation was unwarranted by the evidence, or *was procured by* fraud, coercion, or other improper conduct of any party in interest. *The board may, upon cause shown, extend the time provided in this article for taking such appeal or for the filing of an answer or other pleading.*

In any such appeal the board may disregard the findings of fact of the referee, and may examine the testimony taken before such referee, and if it deem proper may hear other evidence, and may substitute for the findings of the referee such findings of fact as the evidence taken before the referee and the board, as hereinbefore provided, may, in the judgment of the board, require, and may make such disallowance or award of compensation or other orders as the facts so found by it may require.

Section *425*. Whenever an appeal shall be taken on the ground that the referee's' award *or* disallowance of compensation was unwarranted by the evidence, or because of fraud, coercion, or other improper conduct by any party in interest, the board may, in its discretion, grant a hearing de novo *before the board or assign the petition for rehearing to any referee designated by it* or sustain the referee's award or disallowance of compensation. If the board shall grant a hearing do novo, it shall fix a time and place for same, and shall notify all parties in interest.

As soon as may be after any hearing de novo by the

board, it shall in writing state its findings of fact, and award or disallow compensation in accordance with the provisions of this act.

(Amendment of Section 421, Act of 1915.)

Section *427. Any party may* appeal from any *action* of the board on matters of law *to* the court of common pleas of the county in which the accident occurred or of the county in which the reverse party resides or has a permanent place of business, or, by agreement of the parties, to the court of common pleas of any other county of this Commonwealth. *Such appeal must be brought within ten days after notice of the action of the board has been served upon such party, unless any court of common pleas to which an appeal lies shall, upon cause shown, extend the time herein provided for taking the appeal. The party taking the appeal shall, at the time of taking the appeal, serve upon the adverse party a written notice thereof, setting forth in the date of the appeal and the court in which the same is filed, and shall file with his notice of appeal such exceptions to the action of the board as he may desire to take, and shall specify the findings of fact, if any, of the board, or of the referee sustained by the board, which he alleges to be unsupported by competent evidence.*

Upon filing of the notice of an appeal, the prothonotary of the court of common pleas to which the appeal has been taken shall issue a writ of certiorari, directed to the Workmen's Compensation Board, commanding it, within ten days after service thereof, to certify to such court its entire record in the matter in which the appeal has been taken. The writ so issued shall be mailed by the prothonotary to the bureau at Harrisburg, together with a copy of the exceptions. The board shall, within ten days after such service, certify to such court its entire record in the matter in which the appeal has been taken, including the notes of testimony.

Any court before whom an appeal is pending from any action of the board may remit the record to the board for

more specific findings of fact, if the finding of the board or referee are not, in its opinion, sufficient to enable it to decide the question of law raised by the appeal.

If the court of common pleas of any county of this Commonwealth shall affirm an award or order of the board or of a referee sustained by the board, fixing the compensation payable under this act, the court shall enter judgment for the total amount stated by the award or order to be payable, whether then due and accrued or payable, in future instalments. If such court shall sustain the appellant's exceptions to a finding or findings of fact and reverse the action of the board founded thereon, the court shall remit the record to the board for further hearing and determination, in which the procedure shall be the same as that hereinbefore provided in this article in the case of a petition presented to the board, except that the board may order that any part of the testimony taken in the original proceedings shall be considered as though taken in such further hearing.

The prothonotary of any court of common pleas to which an appeal has been taken from the board shall send to the board a certificate of the judgment of the court as soon as rendered, with a copy of any opinion which may be filed in the case. At the end of the period hereinafter allowed for an appeal from the judgment of the court, the record of the board shall be remitted to it by the prothonotary unless an appeal shall have been taken. If such appeal shall be taken, the record shall be remitted to the board by the prothonotary on its return from the appellate court.

Any party may appeal to the Supreme or Superior Court from the judgment of the court of common pleas within thirty days after entry of said judgment. Such appeal shall be taken and prosecuted in the same manner and form and with the same effect as is provided in other cases of appeal to the Supreme or Superior Court, and the record so certified shall contain all that was before the court of common pleas. Any appeal from *the action* of the board to *a court* of common pleas, and from *it* to the Supreme or Superior Court shall take precedence over all other civil *actions.*

(Amendment of Section 425, Act of 1915.)